(17,938.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 453.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, NEW YORK, PLAINTIFF IN ERROR,

vs.

DAVID W. EBAUGH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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a Supreme Court of South Carolina. Spring Term, 3rd Tuesday in April. Fall Term, 4th Tuesday in November.

Henry McIver, chief justice, Cheraw, S. C.
Y. J. Pope, associate justice, Newberry, S. C.
Eugene B. Gary, associate justice, Abbeville, S. C.
Ira B. Jones, associate justice, Lancaster, S. C.

[Vignette.]

U. R. Brooks, clerk.

COLUMBIA, S. C.

I, U. R. Brooks, clerk of the supreme court of South Carolina, do hereby certify this to be a true, full, and complete copy of the record of the case of David W. Ebaugh, plaintiff, respondent, against Eastern Building & Loan Association of Syracuse, N. Y., defendant, appellant, which is now on file in my office; and I do further certify that the opinion rendered by the court in said case is a part of the record of said case.

I do further certify that the original writ of error granted by Chief Justice Fuller, of the U. S. Supreme Court, on the 1st day of October, 1900, a copy of which is now on file in my office, and the assignment of errors thereon, and the original citation, &c., a copy of the supersedeas bond, the original being now on file in my office, are hereto attached.

Given under my hand and the seal of the supreme court of South Carolina, at Columbia, this 13th day of October, in the year of our Lord one thousand nine hundred, and in the 125th year of the Independence of the United States of America.

Seal Supreme Court of South Carolina.

U. R. BROOKS, *Clerk.*

1 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1900, Eighth Circuit, Greenville County.

DAVID W. EBAUGH, Plaintiff, Respondent,
vs.
EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y., Defendant, Appellant.

Case.

This is an action to recover one thousand dollars, the alleged maturity value of ten (10) shares of stock in defendant association. Jury trial waived, and referred to Oscar Hodges as special referee. Heard by his honor, Judge Ernest Gary, on exceptions to the referee's report, at the November term of court for Greenville county, 1899.

STATE OF SOUTH CAROLINA,
County of Greenville.

Court of Common Pleas.

DAVID W. EBAUGH, Plaintiff,
against
EASTERN BUILDING AND LOAN ASSOCIATION, Defendant.

The plaintiff, complaining against the defendant, alleges:

I. That the defendant is a corporation, organized under the
2 laws of the State of New York, with its principal place of business in Syracuse, of said State.

II. That prior to the times hereinafter mentioned, the defendant had been in business for some time, and, as plaintiff is informed and believes, had accumulated a considerable capital stock.

III. That during the month of March or April of the year 1892, this plaintiff was approached by an agent of the defendant and was solicited to take instalment stock in the defendant company. That the plan which was presented to the plaintiff by said agent was that the plaintiff on becoming a member and paying the membership charges, to wit: one dollar per share, would receive a certificate of membership under which he would become liable to pay on each share of his said stock at the rate of seventy-five cents per month for seventy-eight consecutive months, and that then the company would pay to the defendant the full par value of each share, to wit: one hundred dollars; and the said agent represented further that such stipulation would be binding upon the defendant company, and was valid under the laws of the State of New York.

IV. That the plaintiff being ignorant of the laws of the State of New York, relied upon said representation, and agreed to take ten shares of instalment stock in the plaintiff company of the par value of one hundred dollars per share, upon the terms hereinbefore set forth; that thereupon the plaintiff paid the membership fees in the defendant company, to wit: ten dollars, and the company thereon issued to him a certificate for ten shares of stock, which, among other things, bound the plaintiff to pay seventy-five cents per month on each share for seventy-eight months, and the company in said certificate bound itself at the completion of said payments to pay to the plaintiff the par value of said shares on the surrender thereof.

V. That relying upon the representations of the said agent and the stipulations contained in the said certificate, this plaintiff,
3 in addition to the said membership fee of ten dollars, paid to the defendant company the sum of seventy-five cents per month on each share of the said stock for seventy-eight months, beginning with the month of April in the year 1892, and ending with the month of September in the year 1898. That said payments were all made at the times agreed upon, and the *defendant* has performed all agreements on his part with reference to said payments. That during all the said time the defendant well knew that the plaintiff relied upon the said representation made by their agent and the promise con-

tained in the said certificate, and that the said payments were made under the apprehension that the said stipulation was valid and binding in every respect, and would be performed by the defendant company; and that the defendant permitted the plaintiff to continue under said apprehension and to make the said payments until a short time before the last payment, and then the defendant company declined to perform its stipulation as aforesaid.

VI. That on making payment of said instalments for seventy-eight consecutive months, the plaintiff, on September —, 1898, surrendered his certificate in pursuance of the stipulation contained in the said certificate, and demanded compliance with the agreement on the part of the defendant company.

VII. The defendant now declines to perform its said agreement, and alleges that under the laws of the State of New York the said agreement is void, and that it is liable for only what it denominates the withdrawal value of the said shares without interest (which value it claims the right to ascertain and calculate according to regulations of which the plaintiff has no knowledge), and further that said payments are to be made in the order of filing applications for withdrawal, and that the association is not required to pay out on each withdrawal more than one-half of the amount received from dues and stock payments in any month. That the said association
4 has declined to give to the plaintiff any assurance as to when or how much money he may expect under said contract; and although three months have elapsed since the surrender of the said stock, this plaintiff has received no payment thereon or any indication as to when he can expect payment. That the defendant company is further endeavoring by various devices to depress the value of the stock of this plaintiff, in order to secure from him a surrender of his rights against the defendant company for very inadequate consideration; that the defendant persistently denies its liability to the plaintiff under the said contract, and refuses to make any payment to him.

VIII. That if the said stipulation is void under the laws of the State of New York (and to this matter the plaintiff is not advised and, therefore, denies it), this fact was well known to the defendant company and its officers at the time the plaintiff was induced to enter into the said transaction, and that the conduct of the defendant and its agents was fraudulent and was intended to deceive the plaintiff, and the defendant is, therefore, estopped from setting up any such claim, and the defendant is now indebted to the plaintiff in the sum of one thousand dollars, with interest thereon from October 1st, 1898, in pursuance of the terms of its contract as aforesaid.

IX. That if the said stipulation is void under the laws of the State of New York, then the defendant was well aware of said fact at the time of its representations and promises as aforesaid, and the plaintiff is entitled under any circumstances to a return of the money paid by him, with interest from the dates of payment, the same having been procured through the fraud of the defendant and its agents.

Wherefore, the plaintiff demands judgment:

1. Against the defendant for the sum of one thousand dollars, with interest from October 1st, 1898; or, failing in this:

2. He demands judgment for the amounts paid in by him, to wit: five hundred and eighty-five dollars, with interest from the times of the respective payments.

3. For such other relief as may be just.

4. And for the cost of this action.

(Signed) HAYNESWORTH, PARKER & PATTERSON, *Plaintiff's Attorneys.*

January 17th, 1899.

STATE OF SOUTH CAROLINA, }
County of Greenville. }

Personally appeared before me David W. Ebaugh, the plaintiff in this case, who, being duly sworn, says that the foregoing complaint is true of his own knowledge.

(Signed) D. W. EBAUGH.

Sworn to before me, this January 17th, 1899.

(Signed) H. J. HAYNESWORTH,
Notary Public [L. S.]

Answer.

STATE OF SOUTH CAROLINA, }
County of Greenville. }

Court of Common Pleas.

DAVID W. EBAUGH, Plaintiff,
vs.
EASTERN BUILDING AND LOAN ASSOCIATION, Defendant.

The defendant, answering the plaintiff's complaint herein, alleges,

First.

That the defendant's corporate name is "Eastern Building and Loan Association of Syracuse, N. Y.," instead of "Eastern Building and Loan Association," as stated in the title of this action, and that it is a corporation organized under the laws of the State of New York, with its office and principal place for the transaction of business located in Syracuse, N. Y., and the defendant admits that prior to the times mentioned in the complaint, the defendant had been in business for some time, and alleges that it had transacted considerable business.

Second.

For a further answer, the defendant, on its information and belief, denies that during the month of March or April of the year 1892, this plaintiff was approached by an agent of the defendant

company, and that the plan which was presented to the plaintiff by said agent was to the effect that the plaintiff on becoming a member and paying one dollar per share, would receive a certificate of membership under which he would become liable to pay on each share of his said stock at the rate of seventy-five cents per month for seventy-eight consecutive months, and that *when* the company would pay to the plaintiff the full par value of each share, to wit, $100; and that the said agent represented further that such stipulation would be binding upon the defendant company, and was valid under the laws of the State of New York; and defendant alleges that if any such representations as alleged in paragraph three of the plaintiff's complaint were made by any person to the plaintiff, that said agent or person had no power, right, or authority from this defendant to make any statements or representations to the plaintiff for and in behalf of the defendant.

Third.

For a further answer, the defendant, on its information and belief, denies that the plaintiff was ignorant of the laws of the State of New York; that he relied upon such representations, and thereupon subscribed for ten shares of the instalment stock of the defendant company; defendant admits that the plaintiff paid the membership fees in the defendant company, to wit, $10, and the company issued to him a certificate for ten shares of stock, but denies that in said certificate, or in any other way, it bound itself at the completion
7 of the period of seventy-eight months specified in said certificate to pay to the plaintiff the par value of said ten shares on the surrender thereof.

Fourth.

The defendant admits that the plaintiff, in addition to the said membership fee of $10, paid to the defendant company the sum of seventy-five cents per month on each share of said stock, for seventy-eight months, beginning with April, in the year 1892, and ending with the month of September, in the year 1898, but denies the allegations of said complaint in paragraph five thereof, that the plaintiff paid such sum to the defendant, relying upon the representations of any person or persons whatever; and denies that the plaintiff has performed all agreements on his part with reference to said payments, and denies that it, the said defendant, well knew that the plaintiff relied upon the said representations made by their said alleged agent and the promises contained in the said certificate, and denies that said payments were made under the apprehension that the said stipulation was valid and binding in every respect and would be performed by the defendant company; and the defendant further denies that it permitted the plaintiff to continue under said apprehension and to make the said payments until a short time before the last payment, and that then the defendant company declined to perform its stipulation as aforesaid.

Fifth.

The defendant, further answering said complaint, admits that after the plaintiff had made seventy-eight consecutive payments, he offered to surrender his certificate and demanded the par value and the maturity value of $100 per share for each of the shares mentioned in said certificate, and that the defendant company refused to pay the same.

Sixth.

For a further and separate answer and defense herein, the
8 defendant alleges that it was duly incorpro-ted under chapter 122 of the Laws of 1851 of the State of New York, and the acts amendatory thereof and supplementary thereto; that thereafter and on or about the 15th day of March, 1892, the plaintiff duly applied in writing to the defendant at its home office in the city of Syracuse, N. Y., for membership in the defendant association, and subscribed for ten shares of its instalment stock, and in consideration of the acceptance of said application by the defendant, agreed to abide by all the terms, conditions and by-laws contained or referred to in the certificate of shares, and all the rules and regulations of said association, and constituted and appointed the secretary of said association for the plaintiff and in the plaintiff's name, place and stead, to appear and vote as plaintiff's proxy upon any and all shares of stock at any time held by him, or standing in his name in said association, during his absence at any and all meetings of stockholders or directors, and upon any and all matters which might properly come before any such meeting, and attorneys one or more under him from time to time in writing to appoint, thereby authorizing, ratifying and confirming all that his said attorney, or his substitute might do or cause to be done as such proxy by virtue thereof; that said proxy did not in any manner affect the plaintiff's right to vote on all such stock whenever he was personally present at any meeting of the stockholders; that said application containing said proxy was duly accepted by the defendant association, and thereupon, and on or about the first of April, 1892, the defendant issued and delivered to the plaintiff at its home office in the city of Syracuse, N. Y., its certificate of shares, certifying, among other things, that the plaintiff was thereby constituted a shareholder of the defendant association, and the holder of ten shares of its instalment stock, of $100 each, in consideration of the membership fee, together with the agreements and statements contained in the application for membership, and full compliance with the terms, conditions
and by-laws printed on said certificate, which were by its
9 express terms referred to and made a part thereof; that the sum of $100 for each of the shares represented by said certificate were payable by defendant to plaintiff, his executors, administrators, or assigns, only after the plaintiff had paid a monthly instalment of seventy-five cents on each share named in said certificate until such share matured, and only in the manner and upon the conditions set forth in the defendant's articles of incorporation and by-laws, and the terms and conditions printed on said certificate, and

that although seventy-eight months have elapsed from the date of said certificate, nevertheless the conditions set forth in defendant's articles of incorporation and by-laws and the terms and conditions printed on said certificate have not been complied with by plaintiff; that the plaintiff has failed to perform all of the obligations, agreements, and conditions on his part required to be performed, and that said contract has not on his part in all respects been fully kept and performed.

Seventh.

For a further and separate answer and defense, the defendant alleges that if the plaintiff has any claim against the defendant it is solely by virtue of the aforesaid certificate of shares and his interest therein as a shareholder of the defendant association; that under and by virtue of said laws under which defendant is incorporated and its articles of incorporation, by-laws, rules, and regulations, the defendant is purely a mutual corporation in which the rights and duties of all of its stockholders are mutual and reciprocal and that no stockholder has any right at any time to receive in settlement or withdrawal of his stock more than the sum paid in by him on said stock plus the accumulated profits thereon, less the *pro rata* share of expenses and losses of defendant corporation properly chargeable against said stock, pursuant to its articles of incorporation and its by-laws, not inconsistent with said articles and said laws of the State of New York; that any provision in the certificate of stock issued by the defendant corporation to the plaintiff for the shares of stock held by him purporting or pretending to guarantee the maturity value thereof at any fixed time or period without regard to the earnings and profits of the defendant corporation and the equal *pro rata* distribution of the profits, losses, and expenses of the defendant corporation among its stockholders, is a contract or attempted contract *ultra vires* of the corporation, wholly beyond its corporate powers, in contravention of its articles of incorporation, by-laws, and the laws of the State of New York by which it is governed and unenforceable against it, but that there is any such guaranty or agreement to pay is denied and, on the contrary, it is alleged that in contemplation of law the promise to pay plaintiff's stock at its calculated maturity in seventy-eight months was a mere estimate and not a guaranty that it would mature in that time from its share of earnings of the defendant association plus the payments required thereon from the plaintiff.

Eighth.

For a further and separate answer and defense, the defendant alleges that on the 17th day of February, 1899, and at the time of the commencement of this action, said shares of stock had not matured and become worth the sum of $100 per share, and that said stock has not yet matured and become worth $100 per share from the amount paid in thereon by the plaintiff, together with the full proportion of earnings of the defendant to which the same is entitled, less the *pro rata* share of expenses and losses of the defendant association properly chargeable against said stock.

Ninth.

For a further and separate answer and defense, the defendant alleges that under and by virtue of its articles of incorporation and by-laws, the plaintiff, whether his said shares be deemed matured
11 or for withdrawal, is required to file his certificate with the defendant association at its home office, properly receipted; that payment thereof be made in order of filing said certificate, and that the value of said shares is to be calculated as of the date of so filing the same as aforesaid, and that no interest is to be paid upon such value; that said certificate of shares has never been presented to the defendant for payment or filed with the defendant at its home office properly receipted for payment, and that said certificate is now, and always has been since the same was issued by the defendant, in the possession of the plaintiff, as defendant is informed and verily believes.

Tenth.

For a further and separate answer and defense, the defendant alleges that even if said shares of stock have been duly filed with the defendant for payment as withdrawn or matured shares, which the defendant denies, that under and by virtue of the provisions of the articles of incorporation and by-laws of the defendant association, it is not required to pay out to withdrawing or matured shares more than one-half the amount received by the defendant corporation from dues and stock payments in any month; that on the 17th day of February, 1899, and at the time of the commencement of this action, the amount of withdrawing and matured, or alleged matured, stock filed prior thereto by other members of the defendant for payment, greatly exceeded the amount of money in the hands of this defendant applicable to such payment, and since then and still does greatly exceed such amount; that on the 17th day of February, 1899, and at the time of the commencement of this action, there were no funds in the hands of this defendant applicable, under its articles of incorporation and by-laws, to the payment of the plaintiff's alleged claim, and that there have not been since, and are not now, any funds so applicable thereto.

12 Eleventh.

For a further and separate answer and defense, the defendant alleges that said certificate of stock was issued to and accepted by the plaintiff upon the following express terms and conditions, which, among others, were printed upon the face thereof, viz: "Any action brought against this association shall be commenced within six months after filing proofs, and in the county of Onondaga and State of New York." That this action is brought in the county of Greenville, in the State of South Carolina; and that by reason of the aforesaid agreement, this action is not properly brought or triable in said county of Greenville and State of South Carolina, and that this court has no jurisdiction thereof in said county.

Twelfth.

For a further answer and defense, the defendant denies that it declines to perform the agreement that it entered into with the plaintiff, and alleges that it made no other or different contract than that hereinbefore stated as alleged, and that under the terms and conditions of such contract the plaintiff is not entitled to maintain any action against the defendant for the withdrawal value of his stock, until the association has funds on hand applicable to the payment of the same; and defendant further denies that it is endeavoring by various devices to depress the value of the plaintiff's stock in order to secure from him a surrender of his rights against the defendant company for very inadequate consideration, and denies that the defendant persistently denies its liability to the plaintiff under the said contract and refuses to make any payment to him, but, on the contrary, alleges that the refusal of the defendant to pay the plaintiff is for the reason that the plaintiff's stock has not matured and become worth the sum of $100 per share, and that there are no funds on hand applicable to the payment of the plaintiff's stock if the same has actually matured.

13 Thirteenth.

For a further answer, the defendant denies that it and its officers at any time induced the plaintiff to enter into any contract with the defendant, or its agents, which was fraudulent and intended to deceive the plaintiff, and denies that the defendant is indebted to the plaintiff in the sum of $1,000, with interest thereon from October 1st, 1898, in pursuance of the terms of its contract with the plaintiff, in any sum whatever.

Wherefore, the defendant demands judgment dismissing the plaintiff's complaint and his cause of action herein, with the costs and expenses of this action.

(Signed) T. H. SPAIN,
Attorney for Defendant.

STATE OF NEW YORK, } ss:
County of Onondaga, }

Nathan C. Visscher, being duly sworn, says that he resides in the city of Syracuse, N. Y.; that he is the assistant secretary and actuary of the defendant above named; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

NATHAN C. VISSCHER.

Subscribed and sworn to before me, this 18th day of March, 1899.

[L. S.] NELLIE A. POTTER,
Notary Public, Onondaga, N. Y.

Application for Shares in the Eastern Building and Loan Association of Syracuse, N. Y.

Samuel Carpenter, general agent.

D. W. Ebaugh, of Greenville, county of Greenville, State of South Carolina, hereby apply for membership in the Eastern Building
14 and Loan Association of Syracuse, Onondaga county, New York, and subscribe for ten shares of regular stock.

I hereby agree to abide by all the terms, conditions and by-laws contained or referred to in the certificate of shares, and will also comply with all the rules and regulations of said association. And do also hereby, in order to facilitate the transaction of business of the Eastern Building and Loan Association of Syracuse, N. Y., make, constitute and appoint the secretary of said association for me in my name, place and stead, to appear and vote as my proxy upon any and all shares of stock at any time held by me, or standing in my name in said association, during my absence, at any and all meetings of stockholders or directors, and upon any and all matters which may properly come before any such meeting, and attorneys, one or more under him, from time to time in writing to appoint, hereby authorizing, ratifying and confirming all that my said attorney, or his substitute, may do or cause to be done as such proxy by virtue hereof.

This proxy is not in any manner to affect my right to vote on all such stock whenever I am personally present at any stockholders' meeting.

In witness whereof, I have hereunto set my hand and affixed my seal, this — day of ——, A. D. 1892.

Witness D. W. EBAUGH. [SEAL.]

The price of stock must accompany this application.

Series No. C, 4. Maturing October 1st, 1898.

Eastern Building and Loan Association of Syracuse, New York.

Certificate number.	Number of shares.	Amount.
(12170.)	(10.)	($1,000.)

This certifies that D. W. Ebaugh, of Greenville, county of Greenville, and State of South Carolina, is hereby constituted a shareholder of the Eastern Building and Loan Association of Syracuse,
15 New York, incorporated under the laws of the State of New York, and holds ten shares therein, of one hundred dollars each; and in consideration of the membership fee, together with agreements and statements contained in the application for membership in the association, and full compliance with the terms and conditions and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract, and the said Eastern Building and Loan Association of Syracuse, New York, agree to pay said shareholder, or his heirs, executors, adminis-

trators or assigns, the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date hereof, or in case of his death prior to the expiration of seventy-eight months, the association will pay the sum of all monthly instalments paid on this certificate, with interest at six per cent. per annum, payable in the manner and upon the conditions set forth in said terms, conditions and by-laws hereto attached. All payments under this certificate are payable at home office of the association at Syracuse, N. Y., within sixty days after the acceptance and approval of satisfactory proofs.

This certificate of shares is issued to and accepted by the holder thereof upon the following express terms and conditions:

First. The shareholder agrees to pay, or cause to be paid, a monthly instalment of seventy-five cents on each share named in this contract, the same to be paid on or before the last Saturday of each month until such share matures or is withdrawn.

Second. If the shareholder shall fail to pay, or cause to be paid, any monthly instalment on or before the last Saturday of each month, he shall pay a fine of ten cents per share for each and every month the payment may be in arrears.

Third. Stock in this association is non-forfeitable; but if a monthly payment on any share becomes past due and payable for a period of six months or more, such share shall be sold at auction for
16 the purpose of paying the arrearages. The proceeds of the sale shall first be used to pay all back monthly payments and fines; the balance remaining after paying all accrued fines and monthly payments, shall be paid to the member in whose name the stock stands at the time of sale. If the stock brings no more than enough to pay the accrued fines and monthly payments, it shall be bid in by the association and cancelled, and the amount standing to the credit thereof in the loan fund shall be divided among the other shares as profits.

Fourth. Any member in good standing may withdraw their monthly instalment at any time by first giving thirty days' notice, and will receive six per cent. annual interest on all shares of six months' standing, and up to two years; the third year seven per cent.; and any time after the third year, and before maturity, eight per cent.

Fifth. If a shareholder dies, his personal representative may withdraw his shares at any time, or continue on to maturity.

Sixth. At stated periods, the profits arising from interest, premiums, fines and other sources, shall be apportioned among the shares in good standing.

Seventh. All payments must be paid to an authorized agent, or sent to the secretary at the home office by draft, express, or money order, or registered letter. Individual drafts or checks not receivable.

Eighth. The association reserves the right at any time to make an investigation in all cases prior to the approval of claim.

Ninth. The by-laws of this association, which are attached to and endorsed hereon, are a part of this contract, and such by-laws and

this certificate are to be construed together as part of the contract between the association and the shareholder.

Tenth. No shares shall be assignable or transferrable on the books of the association, except by the shareholder paying a transfer fee of two dollars for entering the same, and upon consent of the association, endorsed thereon by the secretary, after all dues and claims on the same have been paid.

Eleventh. It is agreed by all shareholders of this association that desire loans, that all money in the loan fund shall be sold at a uniform rate of ten per cent. bid as premiums on all loans.

Twelfth. No shareholder shall have any claim to any interest in the affairs, assets or funds of this association, nor the control of them, except as above specifically set forth, and assumes no further liability of any kind whatsoever, except as hereinafter described.

Thirteenth. In every case where this contract shall cease and determine, or become null and void, then all payments made thereon shall become forfeited to the association.

Fourteenth. Any action brought against this association shall be commenced within six months after filing proofs, and in the county of Onondaga and State of New York.

Fifteenth. No agent has authority to change this contract in any way, and the association assumes no obligation for any statements not contained in its printed literature.

Given under the seal of said association, at Syracuse, New York, this 1st day of April, A. D. 1892.

[SEAL.]

J. REYNOLDS,
Secretary and General Manager.

H. H. LOUMIS, *President.*

(On back of certificate.)

The within-mentioned shares of stock in the Eastern Building and Loan Association of Syracuse, N. Y., are hereby withdrawn, and I have this day received the sum of — dollars, in full of the amount due me by reason of such withdrawal.

D. W. EBAUGH. [SEAL.]

Dated at Greenville, S. C., October 15, 1898.

Witness:
FRANK NICHOLS.

18 STATE OF SOUTH CAROLINA,
County of Greenville.

Court of Common Pleas.

D. W. EBAUGH
vs.
EASTERN LOAN AND BUILDING ASSOCIATION.

AUGUST 29, 1899.

Amendment of summons and complaint allowed, changing name of defendant to Eastern Building and Loan Association of Syracuse, New York.

Haynesworth, Parker and Patterson appear for plaintiff, and T. H. Spain and J. A. Mooney for defendant.

Testimony.

No. 12170 certificate of stock in defendant company introduced in evidence and marked "Exhibit A."

D. W. EBAUGH, being duly sworn, says:

I live in Greenville, S. C., and was living there in year 1892. An agent approached me in the year 1892, soliciting my subscription to stock in defendant's company. Name of agent was Ousley.

(This testimony is taken subject to defendant's objection, on the ground that there must be proof *aliunde* of agency; and in second place, if there were proof of agency, the statement of the agent or alleged agent made to plaintiff, which is not in exact conformity to the contract sued on, either enlarging or diminishing the liabilities or rights of defendant company, or in any manner whatever changing the same, the testimony would not be taken.)

Testimony allowed and exception noted for defendant.

I applied for stock in defendant's company through the party. Think the same man delivered the policy to me—as well as I can remember, the same man delivered it to me. The same man got up several members in this organization. Mr. Mitchell was the agent of the local board, but Mr. Mitchell afterwards re-
19 signed, and I made payments direct to the company at Syracuse, N. Y. This man that solicited my stock had several papers or slips that I can't remember, that he had a blank policy, but I do know that he had a great many slips, and he explained it all to me.

Plaintiff offers in evidence "Exhibit D," in case as printed in brief or case of Welling & Bonnoitt *vs.* Eastern B. & L. Association, to be found from page 71 to 84. The offer made under agreement on file. "Exhibit D" marked in evidence.

Literature similar to this in "Exhibit D" was exhibited to me (witness) by the agent. My recollection is that literature exhibited by the agent contained a statement that the stock would mature in

seventy-eight months, and also that the company would pay the stockholder at the end of the seventy-eight months $100.00 per share.

(Defendant's counsel objects to what the agent said to witness on the grounds hereinbefore stated.)

Agent said that the stock would mature in seventy-eight months, and that the company would pay $100.00 per share. Agent said that was not an estimate, but that the company would pay the $100.00 per share. Agent said that the association was incorporated in State of New York, and doing business at Syracuse, in said State. Nothing was said as to whether the agreement was valid under laws of New York. I am not positive about this. My subscription was induced by statement in the literature and the statements made by the agent. I believed the representation made by the agent and the literature.

(Would you have become a member of this association if it had not been for your belief in the representations contained in the literature and the representations made by the agent?)

Defendant objects. Sustained, and plaintiff excepts.

Ans. I would not, for I would not have known anything about it. I signed my name to the receipt on back of certificate. The association has never paid me a cent. I signed this at the end of seventy-eight months, and sent the company policy.

Letter, October 15th, 1898, of plaintiff to defendant, introduced in evidence and marked "Exhibit B."

Application for shares introduced in evidence and marked "Exhibit C."

Cross-examination:

I don't remember that any name was signed to that literature. I think I read all of literature that the agent showed me. I don't remember that the literature said that all the members of the association were equal partners. I don't remember seeing that the literature said that the stock matured when the accumulated profits amounted to one hundred dollars per share. I never read the by-laws until after I got the certificate. I can't say that I have ever read them all the way through. I read in the literature when the stock would mature and how much I had to pay each month and about the withdrawal. I can't say to what extent I was influenced to taking stock in the company by what the man said who represented himself to be agent of the company. He had printed statements, and I would not have taken stock alone on what he said, for I didn't know the man.

(This question is asked subject to defendant's objection.)

My recollection now is that Mr. Mitchell delivered the certificate to me. When I signed the application for stock in the company I gave it to Mr. Ously. The certificate was delivered to me after I

signed the application. I think I signed the application in Mr. Mitchell's office.

Plaintiff closed.

D. W. EBAUGH.

Defendant introduces in evidence the articles of incorporation of defendant association, marked "Exhibit A," in said case. Also "Exhibit B" in said case, which are by-laws of said associa-
21 tion. Also "Exhibit T" in said case, the laws of State of New York, known as chapter 122 of Laws 1851, and acts amendatory thereof.

Plaintiff objects to above on the ground that the defendant is estopped by the representations made by or through its agent and printed literature, and its contract, from showing that it had not the authority to make the contract set forth in certificate.

Also "Exhibit U" in said case, which is case of O'Malley *vs.* People's Building Loan and Savings Association, reported in 92 Hun., New York, 572.

It is by defendant admitted that this is a supreme court decision made in 1895.

Plaintiff objects to this on ground that it is not a decision of court of last resort, and hence is not evidence as to law of New York. And also the decision was rendered subsequent to the execution of this contract, and cannot throw any light on the question at issue.

Defendant also introduces in evidence case of Englehardt *vs.* Fifth Ward Dime and Savings Association, reported in 148 N. Y. Also reported vol. 42, North Eastern Reporter, page 710, and decided in January, 1896.

Objected to by plaintiff on the ground that it is subsequent to the execution of the contract in this case.

Also, People *vs.* Lowe *et al.*, reported in 117 N. Y., page 175.

Also, Concordia Savings and Aid Association *vs.* Reed, reported in 93 N. Y., page 474.

Also, so much of deposition of D. A. Pierce as found in folios 340 to 343 inclusive, and 352 to 355 in said case.

Plaintiff objects to introduction of folios 352 to 355 on the ground that the witness merely states his opinion as deduced from the statutes, the article of incorporation, and the decisions of the court of New York, and said matters cannot be proved by same. And it appears that said decision was rendered subsequent to plaintiff's contract.

Also introduce the affidavit of Wallace Visscher under
22 agreement. Plaintiff objects to this affidavit as certain copies of letters from plaintiff to defendant claiming, on the ground that the said testimony is incompetent to prove the contents of the letters. On the further ground that the letters of October 19 and August 12th contain statements in favor of the defendant written by its own officers, and they are incompetent to prove said matters.

It is admitted that the by-laws are noted on back of the certificate.

It is also admitted that C. A. Pooler, if present, would testify that

no shares of the association were ever issued or application therefor accepted at any other place than at the home office of the defendant association in Syracuse, New York.

Defendant closed.

AUGUST 30TH, 1899.

D. W. EBAUGH recalled. The following testimony is taken subject to plaintiff's objection:

In reply to letter of August 12, 1898, to the company, that I had carried out my part of the contract, and I expected them to carry out theirs. That the contract called for $100.00 per share at the end of the seventy-eight months, and I expected the money to be paid. I have written no letter which admitted that they were not responsible to me for the payment of the $100.00 per share at the end of the seventy-eight months. The letter of August 12th, 1898, was the first time I received information that the company claimed that they were not liable to me for the payment of $100.00 per share at end of the seventy-eight months. I made one payment after, and this completed the seventy-eight payments on the contract.

I wrote to the company before signing the receipt, asking them to send me check for $100.00, and in reply they said that I would have to sign the receipt and forward the certificate to them. The only notice I gave them was that when the thing was paid up I wanted my money.

D. W. EBAUGH.

23 Plaintiff introduces in evidence the case of Whitney Co. *vs.* Barlow, as reported in 63 N. Y. Rep., pages 63 to 73, inclusive.

Also case Dr. Grabb *vs.* American Linen Thread Co., as reported in 21st New York Rep., pages 124 to 131 inclusive.

Also case of Diamond Match Co. *vs.* Pooler, as reported in 106 N. Y. Rep., pages 473 to 487 inclusive.

Counsel agree that the New York reports can be referred to and the decisions shall be considered parts of the case.

The referee was requested by defendant's attorney to give full faith and credit to the laws of New York under article 4, sec. 1, of the U. S. Constitution, and under section 905 of the Revised Statutes of the United States.

The Definite Contract Plan.

Eastern Building and Loan Association of Syracuse, N. Y.

Authorized capital, $50,000,000.00.

Incorporated under the laws of the State of New York, under the supervision of the New York State banking department.

Home office: N. W. cor. Salina and Fayette Sts.
Depository: Trust and Deposit Co., of Onondaga.
New York correspondent: Hanover national bank.

Eastern Building and Loan Association of Syracuse, N. Y.

America's leading building association.

Officers and directors:

H. H. Loomis, president, capitalist.

D. H. Murray, vice-president, physician and surgeon.

Jno. J. W. Reynolds, secretary and general manager, building and loan.

Lucius M. Kinne, treasurer, paying teller Trust and Deposit Co. of Onondaga.

24 W. H. Emery, assistant secretary, formerly manager Syracuse Cabinet Co.

M. H. Bunn, assistant general manager, building and loan.

Chas. A. Pooler, superintendent of agencies, building and loan.

Alex. H. Hubbs, manager loan department, formerly real estate.

A. B. Kinne, director, physician and surgeon.

D. A. Pierce, attorney.

Every dollar loaned on first mortgage on inside, improved real estate.

No idle money.

Interest compounded monthly.

Officers and agents bonded. Amount of bonds December 1st, 1891, $703,850.00.

Building associations

are no longer an experiment. The insolvency of a building association is an unknown occurrence. They commend themselves to every community because they furnish the best facilities for borrowing money and, at the same time, retain the benefits of the interest otherwise paid to distant capitalists, while not the least of the benefits which such organizations confer are the habits of saving which they engender and promote. We feel warranted in saying that no system of investment known in this country has proven to be so universally satisfactory to all concerned as the building and

loan system. The system herein presented places the poor man's monthly savings on an equality with the millionaire's surplus, and thereby enables one dollar to earn as much singly as if it were a part of thousands. If affords its shareholders all the advantages of the accumulations of small or large sums of money at more than compound interest, besides being a substantial investment
25 secured by real-estate mortgages. It affords every man the advantage of becoming the owner of his own fireside, and feeling that there is one place on earth he can call "home." Every man struggles to provide a home for his family, and it is his aim to become the owner of it in the shortest possible time.

For the instruction of the reader we here submit a short catechism:

Q. What is the Eastern Building and Loan Association?

A. It is in the nature of a co-operative bank, in which the members are equal partners and the deposits are loaned only to the shareholders.

Q. How are deposits made and regulated?

A. Deposits are small monthly instalments on shares, paid to the association, and are practically compulsory under the by-laws.

Q. How often are the profits divided?

A. Only when stock matures and reaches its par value.

Q. What is the meaning of stock maturing?

A. When the amount deposited, together with accumulated profits, amounts to one hundred dollars on each share.

Q. What amount is deposited monthly?

A. Seventy-five cents per share.

Q. How many shares can each member hold?

A. Two or more shares.

Q. Can women hold shares?

A. Yes.

Q. When will the shares reach their par value?

A. Shares mature in exactly six and a half years.

Q. How much will a member have to pay in altogether?

A. On a basis of ten shares (one thousand dollars maturity value) he will have paid in five hundred and ninety-five dollars ($595) and receives one thousand dollars.

Q. And does a stockholder have to wait until maturity before he can draw his profits?

A. He does, unless he wishes to withdraw entirely, in which
26 event his money is refunded with an equitable amount of dividend added.

Q. When can he withdraw?

A. He can withdraw at any time by giving thirty days' notice of such intention.

Q. Is the stock transferable?

A. It can be transferred at any time.

Q. How is money loaned?

A. On first-mortgage real-estate security, invariably, appraised by members of the local board where the loan is made, who, being investors, are directly interested in the securities.

Q. How is the priority as to borrowing decided?

A. Borrowing members take their turn in receiving money in the same order as the applications are received.

Q. Are there any penalties for delinquencies in making payment?

A. There are. Members in arrears are fined ten cents per share per month, which amount they must pay, together with back dues, to keep their shares in force.

Q. What is the object of this association?

A. The main object is to assist each other in saving money and having what that money earns.

Q. What is the cost of joining this association?

A. The admission fee is one dollar a share, which is paid but once.

Q. Are there any extra assessments?

A. There are none and can be none.

Q. Are there any other charges?

A. There are none except for fines, and no one need be fined if he is punctual in paying his instalments.

Plan.

The capital stock of the Eastern Building and Loan Association is divided into shares of $100 each, par value at maturity. Any person, male or female, may become a shareholder, and may
27 apply for two or more shares. All shares on which payments are made are regularly matured at the expiration of seventy-eight months (six and one-half years) from date of certificate.

Membership Fee.

Membership fee for each and every share (instalment stock) is one dollar per share, and must be paid to the agent when application is made.

Monthly Instalments.

Monthly instalments are seventy-five cents on each one-hundred-dollar share; first instalment due on or before last Saturday of the month in which the certificate is dated, and must be sent to the home office or paid to the local board treasurer, or a legally authorized collecting agent, on or before the last Saturday in each month, without notice.

Fines.

If monthly instalments are not paid when due, a fine of ten cents a share is fixed as a penalty for each month the payment is delinquent, but no share can be retired unless it has been in arrears six month-. All fines go to the loan fund, as profits to members.

Loans.

The money accumulated in the loan fund is loaned to the first approved application from a member. Loans can be made only to members. All loans must be amply secured by first-mortgage real-

estate security. Loans will only be made upon shares that are three months' old, and in good standing. For illustration—suppose a party owns a town lot worth four hundred dollars or upwards, and after he becomes a shareholder desires to borrow one thousand dollars with which to build a home, and he has ten shares of one hundred dollars each, amounting to one thousand dollars. When the shares are three months old or more, he can make application
28 for a loan on blanks furnished by the association, which he fills out, offering a first mortgage on his lot and the improvements to be made thereon with the money so borrowed. If the association, through its directors, on inspecting his application, finds that the security offered is sufficient, and that all is as represented, and all the requirements have been complied with, his application will be approved, and he will be entitled to the next loan; but, should there be several ahead of him, he will take his regular turn, as all applications for loans are taken up in their regular order.

All interest and premiums are payable monthly at the time of paying monthly instalments.

This association has no auction system, whereby some members are inveigled into paying large premiums, but all members pay alike for money borrowed and take their regular turns in receiving loans.

Illustration.

Showing costs and profits to the investor of ten shares or $1,000 in six and one-half years, at time of maturity.

He pays a membership fee of $1.00 per share	$10 00
He pays monthly instalments of $7.50 per month for 78 months, $7.50 x 78	585 00
Total amount invested	595 00
He receives in cash at maturity	1,000 00
His net gain is	$405 00

Illustration.

Showing the cost of $1,000 loan on ten shares of stock for six and one-half years.

He bids ten per cent. ($100), which is deducted from the $1,000 borrowed	
He pays $15.84 per month for 78 months	$1,235 52
He paid for stock	10 00
Total	$1,245 52

29 It will be seen from the above that $345.52 is the amount paid in excess of the actual amount received on loan. This for the use of the money for six and one-half years. Thus the borrower pays less than six per cent. per annum.

He also pays $10 attorney's fees for examining title.

How to Remit.

Remittances can be sent to the secretary at the home office by express order, post-office order, draft, or express, and the secretary will receipt for the same by return mail, or they can be paid to local board treasurer. Any shareholder desiring to pay his monthly instalment semi-annually in advance can do so, and will receive a discount of five per cent. per annum on the money for the time actually advanced, and in this way avoid fines through forgetting and allowing the date of payment to pass.

Assignment of Shares.

Any member may sell and assign his shares by filling out the assignment on the back of his certificate (having his signature witnessed) and forwarding to the home office, with two dollars for approval and transfer on the books of the association. The assignee thereof shall be entitled to the same benefits as the original holder of the certificate. Shares cannot be assigned unless square upon the books of the association to date of assignment. No assignment of shares will be valid unless the approval of the secretary is endorsed thereon.

Withdrawal of Shares.

See inside of back cover.

Loans Without Real-estate Security.

After shares have been in force a year, the holder may obtain a loan on them without other security than the pledging of his shares to the association as collateral, but not to exceed ninety per cent. of their pass-book value. This will enable members who own no real estate to obtain small loans from time to time without paying the exorbitant interest charged by note brokers. No legal fees are charged upon this class of loans.

Paid-up Stock.

Paid-up stock is issued and sold at the price of fifty dollars ($50) per share, payable on date of issue. Parties holding such paid-up stock, wanting to withdraw the same before maturity, may do so after certificate has been in force one year, and receive six per cent. annual dividend from the date of issue to date of withdrawal.

This association issues fully paid certificates at $100 per share, on which the holder receives seven per cent. dividend. Dividend paid quarterly.

(For full particulars regarding paid-up stock and fully paid certificates, see form No. 79.)

Local Boards.

Whenever sufficient stock has been sold in any town to make it advisable, the members residing in such town may organize a local board or branch of the association.

The officers of the local board shall consist of from five to nine directors, who must be shareholders, from whom shall be elected the president, vice-president, secretary and treasurer (combined), and attorney.

The authorized agents of the association have the authority to appoint the first officers of the local board, provided, however, that such appointees shall only hold office until their successors are elected by the members.

A local-board charter will be issued to said board as soon as the agent shall certify to such election or appointment.

Every thoughtful and intelligent man will appreciate the importance of the following arrangement for handling the funds:

The trustees shall receive from the treasurer each month all mortgages, bonds and securities belonging to the association.

31

The secretary is required to deposit all funds in the hands of the treasurer, and he to deposit the same in the depository of this association.

No money can be withdrawn from the treasury for any purpose except by a check signed by the secretary and countersigned by the treasurer, upon an order stating the purpose for which such money is drawn; such order to be signed by the chairman of the executive committee, as authorized by the board of directors. (Extract from resolutions adopted March 4, 1890.)

This renders extravagance, mismanagement and dishonesty on the part of the managers and agents of this association impossible.

Special Notice.

No agent has power to waive or alter any of the conditions or terms expressed in the certificate of shares, or to make any statements other than embraced in the printed literature; and further the association will not be responsible for any bills contracted by any person claiming to be a representative of this association, or for any monies collected (except membership fees on instalment shares), unless explicit authority is given him by the secretary and general manager, which he will have in writing.

Agents or representatives have no authority to promise loans as to time or amount.

For ready reference we submit the following schedule:

32

No. of shares.	Monthly instalments due on or before the last Saturday of each month.	Maturity value of shares at end of 6½ years.	Total amount of instalments paid in 6½ years.	Shares.	Monthly payments by borrower which pay up loan and interest in 6½ years.
2	$1 50	$200	$117 00	2	$3 17
3	2 25	300	175 50	3	4 75
4	3 00	400	234 00	4	6 34
5	3 75	500	292 50	5	7 92
10	7 50	1,000	585 00	10	15 84
20	15 00	2,000	1,170 00	20	31 68
30	22 50	3,000	1,755 00	30	47 52
40	30 00	4,000	2,340 00	40	63 36
50	37 50	5,000	2,925 00	50	79 50
100	75 00	10,000	5,850 00	100	158 40

For further information regarding the details of the workings of the association, call on or address

JNO. J. W. REYNOLDS,
Secretary and General Manager, Syracuse, N. Y.

This is what appears on inside of back cover:

The all-important feature. Practiced only by the "Eastern." Call withdrawals.

Any shareholder may withdraw his monthly instalments paid to the association, at any time, provided no payments of fines are due and unpaid, by his giving thirty days' notice, and will receive six per cent. dividend on all stock of six months' standing up to two years; the third year, seven per cent.; any time after the third year and before maturity, eight per cent. Withdrawals payable only at the home office.

The withdrawal feature is an all-important question to the would-be investor. The plan as originated and in use by the
33 "Eastern" is the only equitable one, inasmuch as it does not discriminate against the poorer class, or those unfortunates who, because of sickness, loss of position or otherwise, are liable at any time to become unable to keep up their monthly instalments. It is only the wealthy who can place their money beyond their reach for a term of years; consequently, under the forfeiture system in use by other companies, it is this class who receive the benefit at the expense of the less fortunate.

No other restrictions imposed.

This is what appears on back of cover:

The only association making a contract definite in every particular.

Withdrawal value clearly stated, and never less than the amount paid in instalments.

Stock matures in seventy-eight months.

Borrowers know the exact amount required to cancel their mortgage.

No auction system.

No lapses.

No forfeitures.

No loans made on farm property, churches, schools, summer hotels or resorts, mills, factories or any property designed for other than general purposes.

STATE OF SOUTH CAROLINA,
County of Greenville.

In the Court of Common Pleas.

DAVID W. EBAUGH, Plaintiff,
against
EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, NEW York, Defendant.

All issues of law and fact arising on the pleadings having been referred to me, I proceeded to hold a reference, and took the testimony which is herewith reported.

The defendant is a corporation chartered in 1890 under the
34 laws of the State of New York. In the spring of 1892, an agent of the defendant approached the plaintiff in Greenville, S. C., where he resides, and solicited him to become a stockholder in the defendant company. The agent exhibited to the plaintiff certain printed circulars or literature, and a specimen of the certificate of stock issued by defendant. The agent also made certain verbal statements to the effect that the company would pay to the plaintiff par value for the stock after seventy-eight monthly payments, and this agreement would be valid. But, as I am in doubt as to the admissibility of these statements, I have not considered them in the discussion of the questions at issue. Practically the same statements, put in a clearer and more tangible form, were contained in the circulars issued by the defendant company and used by its agent in soliciting the plaintiff's subscription. These statements represented the company as promising unconditionally and absolutely that it would pay to the stockholder one hundred dollars for each share of stock at the end of seventy-eight months, alleging that it was "the only association making a contract definite in every particular;" that its "shares mature in exactly six and one-half years;" and that "on a basis of ten shares (one thousand dollars maturity value) he will have paid in five hundred and ninety-five dollars and receives one thousand dollars." The certificate itself contained the following promise: "The said Eastern Building and Loan Association of Syracuse, New York, agree to pay said shareholder, or his heirs, executors, administrators or assigns, the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date hereof."

This promise is clear, unconditional and absolute. The circulars issued by the defendant show that this was its construction of this

promise. I do not think that this promise can be limited or controlled by any indefinite or vague provisions contained in the by-laws.

A similar certificate, together with the charter and by-laws
35 of the defendant company, were before the supreme court in the case of Williamson *vs.* Eastern Building and Loan Association of Syracuse, N. Y., 54 S. C., 582.

The court in that case held that the promise was absolute and unconditional, and bound the defendant to pay one hundred dollars for each share at the end of seventy-eight months. The decision in that case is conclusive of this.

The evidence shows, and I so hold, that the plaintiff paid his entrance fees and all monthly dues.

The Williamson case was an appeal from an order of the circuit judge dissolving the attachment and dismissing the action. This order of the circuit judge proceeded upon two grounds: (1) That the notes and bonds attached were not the subject of attachment. (2) That the changes made in the charter in 1894 and in the by-laws of 1896 provided that not more than one-half of the amount received each month from dues and stock payments should be used in paying withdrawing and maturing stock, and that withdrawals should be paid in the order of the applications therefor. On this ground the circuit judge held that the plaintiff had no present cause of action, and dismissed the proceedings.

In the present case there is absolutely no evidence that there were any changes made either in the charter or by-laws. So that the questions at issue are to be decided as though no such changes had been made.

The supreme court reversed the order of the circuit judge, and held that under the contract of the defendant it was bound to pay to the plaintiff the par value of its stock after seventy-eight months. The question as to whether this promise was in excess of the charter powers was not expressly decided by the supreme court, but that court did decide that even though it were in excess of its charter powers (in the language of B. B. R. R. Co. *vs.* McDonald, 60 Am. St. Rep., 172): "The general rule is that where a private corporation has entered into a contract not immoral in itself, and not for-
36 bidden by any statute, and it has been in good faith performed by the other party, the corporation will not be heard on a plea of *ultra vires*."

This proposition is fully sustained by the decisions of New York. The plaintiff introduced in evidence the following decisions of that court:

Whitney Arms Co. *vs.* Barlow, 63 N. Y., 62.

De Grand *vs.* American Linen Thread Co., 21 N. Y., 124.

Diamond Match Co. *vs.* Roeber, 106 N. Y., 473.

This constituted the only evidence before me as to what was the law of New York touching this point. I find as a matter of fact that the law of New York is that where a corporation enters into a contract that is in excess of its charter powers or is unauthorized by law, it will nevertheless be bound to perform its agreement as con-

tained in the contract, if it suffers the other party to perform his agreement, and receives the benefits and retains them.

This being the law of New York, it is conclusive of the case at issue.

I find as a matter of fact that the defendant promised to pay to the plaintiff one hundred dollars for each share of the stock taken by him at the end of seventy-eight months; and that it represented to him that in issuing this stock it would be bound to perform this agreement according to its terms.

I further find that the plaintiff was induced by this promise and this representation to take the stock; and that believing the promise to be valid and that the defendant intended to perform it, he paid the entrance fee and the monthly dues.

I further find that the defendant, knowing that the plaintiff relied upon the validity of this promise, allowed him to pay his money; and that defendant has continued to hold on to this money and has never offered to return it.

I, therefore, hold that, even if the contract made by the defendant was in excess of its charter powers, it would not be heard to plead *ultra vires*, but would be bound under the law of New York to perform its promise as expressed in the certificate. The de-
37 fendant introduced in evidence chapters 122 and 564 of the Statutes of New York, under which defendant's charter was issued. And he urged upon me to hold that these acts forbid the defendant to make a contract such as that contained in the certificate. There is no provision in these statutes which forbid- such a contract; the most that can be said is that the statutes do not confer the powers or authorize a corporation chartered under them to make such an agreement; in other words, that such an agreement is in excess of its charter powers. But I am by no means convinced that these acts do not confer upon building and loan associations the power to make an agreement of the kind set forth in the certificate of stock. The objection urged against this agreement is that it provides for the maturity of the stock at a definite time. Chapter 122, par. 2, authorizes building and loan associations to provide "the manner of redemption of shares by advances made thereon." "And the ultimate amount to be paid to the owners of unredeemed shares." This chapter as well as chapter 564 evidently contemplate that a building and loan association may issue paid-up stock, and they do not impose any limitation upon the price at which such stock is to be issued, or as to the terms of its redemption. It is clear that under these statutes the association could issue ten shares of paid-up stock for five hundred and eighty-five dollars in cash, to be redeemed at the end of seventy-eight months. For the same reason I do not see why such an association may not issue stock to be fully paid up by seventy-eight monthly payments, and to be redeemed at par at the end of that time. The latter promise may be unwise; but this is not the question at issue. It is whether such a contract is forbidden by the statutes. I am clearly of the opinion that it is not forbidden by the statutes, and I so hold. The most that can be said is that such a promise is not authorized by the statute.

I, therefore, conclude that the promise made by the defendant to pay the plaintiff one hundred dollars for each share of stock
38 at the end of seventy-eight months, is not immoral in itself, and is not forbidden by statute either in New York or in this State.

The defendant introduced in evidence the decision in the case of O'Malley *vs.* People's Building, Loan and Savings Asso., 92 Hun., 572, for the purpose of showing that an agreement like that contained in Ebaugh's certificate is not enforceable under the laws of New York. The plaintiff objected to the introduction of this decision as evidence, on the ground that it was irrelevant to the issues in this case, to wit: (1) That the decision was rendered in 1895, whereas the contract sued on was made in 1892; and (2) in that the decision was made by the supreme court of the State of New York, which is not a court of last resort. While I have admitted the decision, I do not think it has any force in determining the issues between the plaintiff and the defendant. The decisions of the supreme court of New York do not settle the law of that State. They tend to this result no more than do circuit court decisions in South Carolina. I repeat, that in my opinion this contract is neither immoral nor is it forbidden by the laws of New York or of this State.

It is possible that this contract might not be enforceable by a stockholder as against creditors. But there is no such question in this case. There is no allegation that the defendant owes any debts; on the contrary, it was stated in argument that the defendant association was abundantly solvent.

The question is merely between the association itself and one of its stockholders, between him who promises and him to whom the promise is made.

It is urged that to allow plaintiff to recover judgment on his contract will work a preference to him over other stockholders.

This argument might meet with some consideration if insolvency proceedings had been commenced, and a receiver appointed. But no such proceedings have been started; and there is no evidence that to allow the plaintiff judgment will work a preference
39 in his favor. But even if it did work a preference, this would be no defence to an action at law brought upon the defendant's agreement.

Again, it is said that if the courts hold the defendant to be bound by its promise as contained in its certificate, this would operate to bankrupt the defendant. But this argument cannot prevail. It is the business of courts to enforce contracts as made, and its hands will not be stayed by reason of the debtor's plea that the enforcement of his obligations will reduce him to bankruptcy. It may be that the defendant's agreement with its stockholders was unwise, but if so this court has nothing to do with that question.

This is an action at law, brought upon a contract made by the defendant. This contract is to be enforced according to its terms.

To summarize my conclusions, I hold as follows:

(1.) That the defendant bound itself in express terms to pay to the plaintiff one hundred dollars for each share of stock subscribed by

him at the end of seventy-eight months, provided he paid his monthly instalments during that time; and that the plaintiff did pay all his monthly dues.

(2.) That this promise was not immoral in itself, and was not forbidden by the statutes of law of New York as established at the time of the contract.

(3.) That even if this contract was in excess of its chartered powers, and was unauthorized by the laws of New York, yet under the principle of law as established in that State and in this State the defendant would be bound to discharge its promise, where it had received, and where it retains, the benefit of the transaction. I find that it did receive, and does retain, the benefit of the transaction and that it suffered the plaintiff to perform his part of the agreement under the belief that its promise was valid, and that it would discharge such promise according to its terms.

I, therefore, hold that the plaintiff is entitled to judgment against the defendant for the sum of one thousand dollars, with interest from October 15, 1898, at the rate of seven per cent. per annum and for the costs of this action.

All of which is respectfully reported.

(Signed) OSCAR HODGES,
Special Referee.

Greenville, S. C., September 19, 1899.

Exceptions.

STATE OF SOUTH CAROLINA,
County of Greenville.

In Court of Common Pleas.

DAVID W. EBAUGH, Plaintiff,
against
EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y., Defendant.

To Messrs. Haynsworth, Parker and Patterson, plaintiff's attorneys:

Please take notice that the defendant in the above-entitled case appeals to the circuit court from the report of the special referee, made in same case, bearing date September 19th, 1899, on the following grounds:

I. That the referee erred in allowing the plaintiff to testify to representations and statements purporting to have been made to him by an alleged agent, when there was no proof of agency, other than mere declamations as to that fact made by the alleged agent.

II. That the referee erred in holding that the circular or literature, purporting to have been issued by the defendant, represented that the defendant promised, unconditionally, to pay the plaintiff one hundred dollars for each share of stock at the expiration of seventy-eight months. It being submitted that what was said relative to the maturity of stock in that time was merely an expression of

opinion as to the time it would take the earnings of the de-
41 fendant to bring the stock up to the par value of one hundred dollars and on which no legal reliance could be placed.

III. That the referee erred in not holding specifically that the contract was to be governed and construed by the laws of the State of New York.

IV. That the referee erred in not holding that the contract in question was to be sought for in the laws of New York, the defendant's articles of incorporation, by-laws, the certificate, its terms and conditions, and the application for membership.

V. That the referee erred in his construction of the contract, by holding that it was an absolute and unconditional promise to pay one hundred dollars per share at the expiration of seventy-eight months, when the clause in the certificate relative to the seventy-eight months ought to have been construed as an estimated period of maturity.

VI. That the referee erred in holding that the provisions in the certificate, relative to the payment of one hundred dollars per share at the expiration of seventy-eight months, was not to be controlled by the laws of New York, nor any provision in the defendant's articles of incorporation, or by-laws.

VII. That the referee erred in finding as a fact, that a corporation chartered under chapters 122 and 564 of the laws of New York, which issued a certificate containing a fixed period of maturity, would not be heard on a plea of *ultra vires*, and would be bound thereby.

VIII. That the referee erred in holding that under the laws of New York the defendant had the power to issue a certificate containing a fixed period of maturity, and would be bound by it, as an absolute promise to pay one hundred dollars per share at the end of seventy-eight months.

IX. That the referee erred in holding that the decision of O'Malley *vs.* People's Building, Loan and Savings Association, 92 Hun., N. Y.,
572, rendered by the appellate division of the supreme court
42 of New York, had no application to this case on two grounds: (1) That the decision was rendered after the contract was made; and (2) that the decision of said court does not settle questions of law in that State. It is respectfully submitted that said decision does apply to this case, notwithstanding the fact of its rendition after the creation of the contract, and that there was no proof going to show that said court does not settle questions of law in that State, but the proof is that it does.

X. That the referee erred in finding as a fact, that the defendant represented to plaintiff that it would pay him at the expiration of seventy-eight months one hundred dollars per share, and thereby induced plaintiff to purchase stock.

XI. That the referee erred in finding as a fact that the defendant knew that the plaintiff was expecting to be paid one hundred dollars per share at the expiration of seventy-eight months, regardless of the earnings of the defendant.

XII. That the referee erred in not giving full faith and credit to

the laws of New York under article 4, section 1, of the Constitution of the United States, and under section 905 of the Revised Statutes of the United States.

XIII. That the referee erred in not finding as facts, that the court of appeals of New York had decided the following cases (which were introduced into evidence by the defendant), to wit: Englehardt *vs.* Fifth Ward Dime Savings and Loan Association, 148 N. Y., page 281; People *vs.* Lowe *et al.*, 117 N. Y., page 175; and Concordia Savings and Aid Association *vs.* Read *et al.*, 93 N. Y., page 474.

XIV. That the referee erred in not finding as a fact the earnings of the defendant had not matured the plaintiff's stock.

XV. That the referee erred in not finding as a fact that at the commencement of this action there was not money in the treasury with which to pay plaintiff's withdrawal claim.

XVI. That the referee erred in not dismissing the complaint on the ground that the action was prematurely brought.

43 XVII. That the referee erred in finding and holding that the plaintiff was induced to enter into the contract by reason of the fixed period of seventy-eight months, when the law charged plaintiff with notice as to the extent of the defendant's chartered powers, and that plaintiff knew that the defendant could not issue a certificate containing a fixed period of maturity, and that plaintiff knew that the defendant was a mutual association, each member being entitled only to his *pro rata* share of the profits.

(Signed) T. H. SPAIN,
Defendant's Attorney.

October 4, 1899.

UNITED STATES OF AMERICA, }
State of New York. }

By John Palmer, secretary of state and custodian of the great seal thereof.

It is hereby certified, that John Palmer was, on the day of the date of the annexed certificate and attestation, secretary of state of the State of New York, and duly authorized to make the same; that such secretary of state is the proper officer to make such certificate and attestation, and that the same are in due form; that the seal affixed to said certificate is the seal of office of the secretary of state of the State of New York; that the signature thereto of the said secretary of state is in his own proper handwriting, and is genuine; and, further, that the secretary of state is the custodian of the original law, so certified and attested, and custodian of the great seal of said State, hereunto affixed, and that full faith and credit may and ought to be given to his official acts.

[L. S.] In testimony whereof, the great seal of the State is hereunto affixed.

Witness my hand and seal at the city of Albany, the 25th day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

JNO. PALMER,
Secretary of State.

44 CHAP. 122.

An act for the incorporation of building, mutual loan, and accumulating-fund associations, passed April 10, 1851.

The People of the State of New York, represented in senate and assembly, do enact as follows:

1. Any number of persons, not less than nine, may associate and form an incorporated company for the purpose of accumulating a fund for the purchase of real estate, the erection of buildings, or the making of other improvements on lands, or to pay off incumbrances thereon; or to aid its members in acquiring real estate, making improvements thereon and removing incumbrances therefrom, and for the further purpose of accumulating a fund to be returned to its members, who do not obtain advances as above mentioned, when the funds of such association shall amount to a certain sum per share, to be specified in the articles of association.

2. Such persons shall severally subscribe articles of association, in which shall be set forth the name of the corporation, the time of its regular meetings, and how special meetings may be called, and what shall constitute a quorum to transact business at meetings; the qualification of members and how constituted; what officers, trustees and attorney there shall be, and how and when chosen, and their duties, and how removed or suspended from office; the entrance fee of new members and new shares, the monthly or weekly dues per share, the redemption fee on shares on which advances shall be made, and fees to be paid on the transfer of shares; the fines and penalties for non-payment of dues or fees, or other violation of the articles of association; the manner of redemption of shares by advances made thereon, the mortgaged security to be taken on such advances, and how the same may be redeemed or changed; the manner of transfer or withdrawal of shares; the manner of investing funds not required for advances on shares; the qualifications of voters at the meetings, and the mode of voting; the ultimate amount to be paid to
45 the owners of unredeemed shares; the manner of altering or amending the articles of association and such other provisions as shall be necessary for the convenient and effective transaction of the business thereof; provided that the same shall not in any respect contravene the constitution or laws of this State.

3. A true copy of such articles signed by the officers of the association, together with a statement showing when the association was organized, and the place of the transaction of its business, and the name of the officers and trustees at the time of the making such statement, which shall be verified by oath or affirmation before any officer authorized to take affidavits to be used in courts of justice shall be filed in the office of the clerk of the county in which such association shall transact its business; and thereupon the persons who have subscribed the articles of association as aforesaid, and such other persons as shall become members of such association, and their successors, shall be a body corporate, by the name specified in such articles of association, and shall possess the powers and privileges,

and be subject to the provisions of title third of chapter eighteen of the first part of the Revised Statutes, so far as those provisions are consistent with the provisions of this act, and they shall by their corporate name, be capable in law of purchasing, holding and conveying any real and personal estate whatever, which may be necessary to enable the said company to carry on their operations named in such certificate.

4. It shall be lawful for the trustees to call in and demand from the stockholders respectively, all such sums of money by them subscribed, at such times, and in such payments or instalments, as the articles of association shall prescribe, under the penalty of forfeiting the shares of stock subscribed for, and all previous payments made thereon, if payment shall not be made by the stockholder within sixty days after a personal demand or notice requiring such payment shall have been published for six successive weeks in the newspaper nearest to the place where the business of the company
46 shall be carried on as aforesaid.

5. All corporations formed under this act shall have power to borrow money for temporary purposes not inconsistent with the objects of their organization; but no loan for such purposes shall have a longer duration than two years, nor shall such indebtedness exceed at any one time one-fourth of the aggregate amount of the shares and parts of shares and the income thereof, actually paid in and received.

6. Parents and guardians may take and hold shares in such association in behalf and for the use of their minor children or wards, provided the cost of such shares be defrayed from the personal earnings of such minor children or wards, or by gifts from persons other than their male parents; married women may take and hold shares in such associations, provided the cost of such shares be defrayed from their personal earnings, the personal earnings of their children voluntarily bestowed for this purpose, or from property bequeathed or given to them by persons other than their husbands.

7. Every such corporation shall terminate except for the purpose of settling its affairs, whenever all the shares thereof shall be redeemed by advances thereon; or whenever the owners of unredeemed shares shall be paid the ultimate value thereof as provided in the articles of association and not sooner, but no dividend of principal or of profits shall be made until such termination; nor until all the debts of the association shall have been paid or otherwise sufficiently provided for. No holder of redeemed shares shall claim to be exempt from making the monthly payments provided in the articles of association, upon the ground that by reason of losses, or otherwise, the association has continued longer than was originally anticipated, whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest thereon; nor shall the imposition of fines for non-payment of dues or
47 fees, or other violation of the articles of association, or of any premium for loans made to members, be deemed to be a violation of the provisions of any statute against usury.

8. Any existing association, formed for the purposes mentioned

in the first section of this act may on the vote of a majority of the voting shares, at any regular meeting, after the passage of this act become entitled to the benefit of this act, on complying with the second and third sections thereof, unless the second section has heretofore been complied with; in which case it shall be necessary to comply only with the said third section.

9. No officer, trustee, attorney, agent or servant of any association hereby incorporated, shall use or dispose of any part of the funds of such association, or assign, transfer, cancel, deliver up or acknowledge satisfaction of any bond, mortgage or other written instrument belonging to such association, unless duly authorized, or be guilty of any fraud in the performance of his duties; and every person guilty of a violation of this section shall be liable civilly to the party injured, to the extent of the damage thereby incurred, and shall also be liable to an indictment for a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court by which he shall be tried.

10. Each association formed under the provisions of this act shall, at the close of its first year's operations, and annually at the same period in each year thereafter, publish in at least two newspapers published in the place where their business may be located, or if no newspaper shall be published in such place, then in any two newspapers published nearest such place, a concise statement, verified on the oaths of its president and secretary, showing the actual financial condition of the association, and the amount of its property and liabilities, specifying the same particularly.

11. All shareholders of any association formed under this act shall be individually liable to the creditors of said association to
48 an amount equal to the amount of stock held by them respectively, for all debts contracted by such association. The directors or other officers of every association formed under this act, shall be personally liable for any fraudulent use, disposition or investment of any monies or property belonging to such association, or for any loss which shall be incurred by any investments made by such directors or other officers, other than such as are mentioned in and authorized by this act; but no director or other officer of any such association shall be liable as aforesaid, except he authorized, sanctioned, approved or made such fraudulent use, disposition or investment as aforesaid.

12. No person holding stock in any such company, or executor, administrator, guardian or trustee; and no person holding such stock as collateral security shall be personally subject to any liability as stockholder of such company, but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estate and funds in the hands of such executor, administrator, guardian or trustee, shall be liable in like manner, and to the same extent as the testator or intestate, or the ward or person interested in such trust fund would have been if he had been living and competent to act, and hold the same stock in his own name.

13. Every such executor, administrator, guardian or trustee shall

represent the share of stock in his hands at all meetings of the company, and may vote accordingly as a stockholder; and every person who shall pledge his stock as aforesaid may, nevertheless, represent the same at all such meetings, and may vote accordingly as a stockholder.

14. In case it shall happen at any time that an election of officers shall not be made on the day designated by the by-laws of said company, when it ought to have been made, the company for that reason shall not be dissolved, but it shall be lawful on any other day to hold an election for trustees, in such manner as shall be provided by the said by-laws; and all acts of trustees shall be valid
49 and binding as against such company, until their successors shall be elected.

15. The legislature may at any time alter, amend or repeal this act, or may annul or repeal any incorporation formed or created under this act, but such amendment or repeal shall not, nor shall the dissolution of any such company take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred.

16. Any company which may be formed under this act, may increase or diminish its capital stock by complying with the provisions of this act, to any amount which may be deemed sufficient and proper for the purposes of the corporation. But before any corporation shall be entitled to diminish the amount of its capital stock, if the amount of its debts and liabilities shall exceed the amount of capital to which it is proposed to be reduced, such amount of debts and liabilities shall be satisfied and reduced so as not to exceed such diminished amount of capital.

17. Whenever any company shall desire to call a meeting of the stockholders for the purpose of increasing or diminishing the amount of its capital stock, it shall be the duty of the trustee to publish a notice, signed by at least a majority of them, in a newspaper in the county, if any shall be published therein, at least three successive weeks, and to deposit a written or printed copy thereof in the post-office, addressed to each stockholder at his usual place of residence, at least three weeks previous to the day fixed upon for holding such meeting, specifying the object of the meeting, the time and place when and where such meeting shall be held, and the amount to which it shall be proposed to increase or diminish the capital, and a vote of at least two-thirds of all the shares of stock shall be necessary to an increase or diminution of the amount of its capital stock.

18. If at any time and place specified in the notice provided for in the preceding section of this act, stockholders shall appear
50 in person or by proxy, in numbers representing not less than two-thirds of all the shares of stock of the corporation, they shall organize by choosing one of the trustees chairman of the meeting, and also a suitable person for secretary, and proceed to a vote of those present, in person or by proxy; and if on canvassing the votes it shall appear that a sufficient number of votes has been given in favor of increasing or diminishing the amount of capital, a certificate of the proceeding, showing a compliance with the provisions

of this act, the amount of capital actually paid in, the whole amount of debts and liabilities of the company, and the amount to which the capital stock shall be increased or diminished, shall be made out, signed and verified by the affidavit of the chairman, and be countersigned by the secretary; and such certificate shall be acknowledged by the chairman, and filed as required by the first section of this act, and when so filed, the capital stock of such corporation shall be increased or diminished to the amount specified in such certificate.

19. The shares held by the members of all associations incorporated under the provisions of this act, shall be exempt from sale on execution for debt, to an extent not exceeding six hundred dollars in such shares, at their par value.

20. No loan made by any such association to any of its members may exceed in amount the par value of the capital stock for which such member may have subscribed.

21. The copy of any certificate of incorporation, filed in pursuance of this act, certified by the county clerk or his deputy to be a true copy, and of the whole of such certificate, shall be received in all courts and places as presumptive legal evidence of the facts therein stated.

22. This act shall take effect immediately.

CHAP. 564.

An act to amend chapter one hundred and twenty-two of the laws of eighteen hundred and fifty-one, entitled "An act for the incorporation of building, mutual loan, and accumulating-fund associations," passed June 9, 1875.

The People of the State of New York, represented in senate
51 and assembly, do enact as follows:

SECTION 1. The seventh section of chapter one hundred and twenty-two of the laws of eighteen hundred and fifty-one, entitled "An act for the incorporation of building, mutual loan and accumulating-fund associations," is hereby amended so as to read as follows:

7. The trustees of any association formed under the provisions of this act may, from time to time, declare dividends from the earnings of the association, payable in such manner as may be provided in the articles of association; but no dividend shall be declared, except from the earnings of the association; and if the trustees of any such association shall declare and pay any dividend when the company is insolvent, or any dividend the payment of which would render it insolvent, they shall be jointly and severally liable to the extent of the dividend so declared and paid, for all the debts of the association then existing or that shall be thereafter contracted while they shall respectively continue in office; provided, that if any of the trustees shall object to the declaring of such dividend or to the payment of the same, and shall, at any time before the time fixed for the payment thereof, file a certificate of his objection in writing with the clerk of the company, and with the clerk of the county, he shall be exempt from the said liability. But no trustee who shall be present at any meeting when such dividend is declared, shall be

exempt from such liability, unless he shall then and there object to the declaration or payment of such dividend, and shall also procure his objection to be noted in the book of minutes of such association. No holder of redeemed shares shall claim to be exempt from making the monthly or other stated payments provided in the articles of association, upon the ground that, by reason of losses or otherwise, the association has continued longer than was originally anticipated, whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest
52 thereon; nor shall the imposition of fines for the non-payment of dues or fees, or other violation of the articles of association, nor shall the making of any monthly payment required by the articles of association or of any premium for loans made to members, be deemed a violation of the provisions of any statute against usury.

2. Every corporation organized under the provisions of said act, and every corporation heretofore organized under the laws of this State for purposes similar to those provided for in said act, shall annually make a full report in writing of the affairs and conditions of such corporation, on the first day of January in each year, to the superintendent of the banking department, in such form any by such officers of the said corporation as the said superintendent may designate, which report shall be in place of any report which any such corporation may now be required to make to the supreme court, the comptroller, or otherwise. Such report shall be verified by the oath or affirmation of the officers making such report; and any wilful false swearing in regard to such report shall be deemed perjury, and be subject to the prosecutions and punishments prescribed by law for that offense. Every such report shall be made within twenty days after the day to which it relates, and shall be in such form, and contain such statements, returns and information as to the affairs, business, condition, obligations and resources of such corporation as the said superintendent may, from time to time, prescribe and require. And the said superintendent may, if he be of opinion that it is desirable, require that a like report, either wholly or in part, as to the particulars aforesaid, be made to him at any time by any such corporation aforesaid, within such period as he may designate.

3. It shall be the duty of the said superintendent, once in two years, either personally or by some competent person or persons, to be appointed by him, to visit and examine every corporation required by this act to report as aforesaid. The said superintendent and every such examiner shall have power to administer an
53 oath to any person whose testimony may be required on any such examination, and to compel the appearance and attendance of any such person for the purpose of such examination, by summons, subpœna or attachment, in the manner now authorized in respect to the attendance of persons as witnesses in the courts of record of this State; and all books and papers which it may be deemed necessary to examine by the superintendent, or the examiner or examiners so appointed, shall be produced, and their pro-

duction may be compelled in the like manner. The expense of every such examination shall be paid by the corporation examined to such amount the superintendent shall determine. Whenever such examination shall be made by the superintendent personally, or by one or more of the regular clerks in his department, no charge shall be made on such examination but for necessary traveling and other actual expenses.

4. On every such examination inquiry shall be made as to the condition and resources of the corporation generally, the mode of conducting and managing its affairs, the action of its directors or trustees, the investment of its funds, the safety and prudence of its management, the security afforded to those by whom its engagements are held, and whether the requirements of its charter and of law have been complied with in the administration of its affairs.

5. If it shall appear to the said superintendent from the report of any such corporation, or from any examination made by him, or from the report of any examination made to him, that any corporation has committed a violation of its charter or of law, or is conducting business in an unsafe or unauthorized manner, he shall, by an order under his hand and seal of office, addressed to such corporation, direct the discontinuance of such illegal or unsafe practices, and conformity with the requirements of its charter and of law, and with safety and security in its transactions; and whenever any corporation shall refuse or neglect to make such report as is hereinbefore required, or to comply with any such order as aforesaid; or whenever it shall appear to the superintendent that it is unsafe or inexpedient for any corporation to continue to transact business, he shall communicate the facts to the attorney general, who shall thereupon be authorized to institute such proceedings against any such corporations as are now or may hereafter be provided for by law, in the case of insolvent corporations, or such other proceedings as the nature of the case may require.

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6. If any such corporation shall fail to furnish to the superintendent of the banking department any report or statement required by this act at the time so required, it shall forfeit the sum of ten dollars per day for every day such report or statement shall be so delayed or withheld, and the said superintendent may maintain an action in his name of office to recover such penalty, and when collected, the same shall be paid into the treasury of the State, and be applied to the expenses of the bank department.

7. This act shall take effect immediately.

104–6–17–'97–200.

STATE OF NEW YORK, } ss:
Office of the Secretary of State, }

I have compared the preceding with the original laws on file in this office, and do hereby certify that the same are correct transcripts therefrom, and the whole of said original laws.

Given under my hand and the seal of office of the secretary

of state, at the city of Albany, this 25th day of January, in the year one thousand eight hundred and ninety-eight.

JNO. PALMER,
Secretary of State.

O'MALLEY
vs.
PEOPLE'S BUILDING, LOAN AND SAVINGS ASSOCIATION.

Reported in 92 Hun. (N. Y.), 572.

LEWIS, *J.*:

"This action was brought to recover the sum of $500, claimed to be due upon a certificate of five shares of stock issued by the
55 defendant to the plaintiff, of the par value of $100 a share. The principal question presented is whether the plaintiff is entitled to recover the par value of the shares, or whether his recovery shall be limited to the sum of $371, that being the amount, as claimed by the defendant, which the shares had earned at the time this action was commenced.

"The defendant is a building, loan and savings association. It was organized in the month of December, 1887, under chapter 122 of the Laws of 1851, entitled 'An act for the incorporation of building, mutual loan and accumulating-fund associations,' and the acts amendatory thereof and supplemental thereto. Its principal office is in the village of Geneva, Ontario county, N. Y. Its capital stock is $5,000,000, represented by 50,000 shares of the par value of $100 a share. It is provided by section 1 of the act of 1851 that any number of persons, not less than nine, may associate in forming an incorporated company for the purpose of accumulating a fund for aiding its members in acquiring real estate, making improvements thereon, and removing incumbrances therefrom, and for the further purpose of accumulating a fund to be returned to its members who do not obtain advances upon their shares of stock when the funds of the association shall amount to a certain sum per share, to be specified in the articles of association. The act provides for the filing of articles of association, which are to be subscribed by the members, in which shall be stated, among other things, the amount of the entrance fee of new members and new shares, the monthly or weekly dues per share, the redemption fee on shares on which advances shall be made, the fines and penalties for non-payment of dues, fees, or other violations of the articles of association, the manner of redemption of shares by advances made thereon, the mortgage security to be taken on such advances, how same may be redeemed or changed, and the ultimate amount to be paid to the owners of unredeemed shares. It was further provided by said act that corporations formed under it shall have the power to borrow
56 money for temporary purposes, not inconsistent with the objects of their organization, but no loan for such purposes shall have a longer duration than two years.

"Articles of association were duly subscribed and filed by the defendant. It is provided therein that persons, on becoming members

of the association, shall duly subscribe a written application for shares desired to be purchased, and pay an admission fee of $1 on each share, and thereafter pay one dollar a month on each share, and in addition thereto the sum of 25 cents every three months. The scheme and plan of the association is, briefly, to issue its shares of stock to persons desiring to purchase the same; and with the moneys paid by the shareholders, and the fines and penalties which may be imposed upon the members, to accumulate a fund, which, after paying the expenses of the association, is to be loaned or advanced to the holders of the shares of stock who may make application therefor, to the amount of the par value of the stock. The moneys advanced are to be secured by the bond of the applicant, and by a mortgage upon unincumbered real estate, conditioned to pay on the amount borrowed annual interest of five per cent., and in addition thereto a premium of five per cent. per annum, the interest and premium to be paid in weekly instalments, until the mortgage matures. The certificates of stock upon which advances are not made may be held by the owner as an investment simply. The holder thereof is entitled to the dividends which may be made thereon from time to time. It is provided by the defendant's by-laws that any member, in lieu of paying the monthly and quarterly instalments, may, at the time of making application, pay $60 a share, and receive a paid-up certificate with a maturity face value of $100. The holders of these paid-up certificates are not liable for any admission fee, fines, or to the cancellation of their stock; and they may, upon the surrender thereof, withdraw the amount they have paid on the same at any time after three years from the date of issue thereof, and before maturity, together with annual
57 interest of six per cent. The by-laws also provide that the directors may, in lieu of the admission and other fees, deduct from paid-up certificates six per cent. per annum on the maturity face value of the stock for the estimated period of five years, and place the same in the expense fund, to defray the expenses of the association.

"The purpose of the law, it will be seen, is to provide an opportunity for the people of limited means to invest a portion of their income, making payments in small sums from time to time, and thereby secure to themselves homes, which they might not be able to do if they were required to make their payments in large amounts. If the affairs of such associations are conducted in conformity to the law and their articles of association and by-laws, the investments of the shareholders are reasonably safe; but if, on the contrary, they are improvidently and carelessly managed, they are quite sure to fail in their purpose.

"There was issued to the plaintiff, upon his written application therefor, on the 2d day of December, 1889, a certificate for five shares of the defendant's stock. It was provided in the certificate that the plaintiff was constituted the holder of five shares of stock of the defendant, of $100 each,' in consideration of the entrance fee, together with agreements and full compliance with the terms and conditions printed upon the back of this certificate, and the articles of association

and by-laws adopted by the said association, all of which are hereby referred to and made a part of this contract.' The certificate further stated that the defendant agreed to pay said shareholder, or his heirs, executors, administrators or assigns, the sum of $100 for each of said shares at the end of five years from the date thereof, or, in case of his death before the expiration of said term, then the sum of money equal to the amount of monthly instalments paid on the shares, together with all dividends which have accrued thereon, 'all of which are payable in the manner and upon the conditions set forth in the articles of association and by-laws, and terms and conditions
58 printed on the back of this certificate.' The plaintiff in all respects complied with the rules and regulations of the defendant, and upon the expiration of the five years from the date of the certificate he presented it to the defendant, and demanded payment for its par value. The defendant declined to pay the $500, for the alleged reason that the shares had not then earned that amount, but stated that the amount they had earned was $371, which the defendant offered to pay to the plaintiff upon the surrender by him of the certificate. The plaintiff declined to accept the amount so offered, and thereupon brought this action. The trial court construed the certificate to be an absolute, unconditional promise to pay the $500 upon the expiration of five years from its date, and directed a judgment accordingly.

"The main question presented by the appeal, as stated, is whether the plaintiff is entitled to recover the face value of the certificate, or shall his recovery be limited to the amount the shares have earned? If the language of the certificate alone is to be considered, there can be but little doubt that the decision of the trial court was right. In construing this contract, the defendant's articles of association and by-laws must be considered as part of the contract, and given their proper effect. Gibbs *vs.* Bank, 83 Hun., 92; 31 N. Y. Supp., 406; *In re* Commissioners of Washington Park, 52 N. Y., 131. It is reasonably certain that if the construction contended for by the plaintiff is to prevail, it will thwart the scheme and purpose of the association, and probably bankrupt it. The plan of the organization contemplates that the holders of certificates shall be entitled to share equally in its earnings. It is a mutual association. It cannot with any propriety be claimed that, under the defendant's articles and by-laws, it was contemplated that there should be any distinction in the time for the maturity of the shares of stock. The officers of the defendant, however, assumed to issue to the plaintiff a certificate which, upon its face, states that the company, at the end of five years, will pay to the holder
59 thereof the sum of $100 a share. Plaintiff's payments were $13 a year on each share of his stock, amounting, upon his five shares, to $65 a year, and in five years to the sum of $325. Interest computed at six per cent. per annum on the payments from the time they were respectively made until the end of the five years, amounts to between $45 and $46, which, added to the payments, makes $371, the amount which the defendant claimed the shares had earned, and which it offered to pay. If the plaintiff is entitled to

recover the $500, his investment earned him from 22 to 23 per cent. per annum; an amount of interest which, if paid upon all certificates issued by the defendant, would in probability bankrupt the association, a result which, it would seem, must have been apparent to the parties when the transaction took place.

"The plaintiff was presumably aware of the general plan of the association, for it was stated in his certificate that the articles of association and the by-laws were to form a part of the contract, and, as stated, the general plan of the association contemplated that all the shareholders should be entitled to a *pro rata* share of its earnings. He must have been aware that it was not at all probable that the earnings of the association would be sufficient to pay the rate of interest which his construction of the contract calls for. It was not possible to know, at the time the certificate was issued to the plaintiff, when it would mature by the accumulation of dividends, for that necessarily depended upon the earnings of the association, and that could not be determined in advance. The dues, fees and penalties paid by the shareholders, with the interest and premiums paid by the borrowing members, make up and constitute the income of the association, and provide the fund from which the dividends upon the stock are paid. People *vs.* Preston, 140 N. Y., 549; 35 N. E., 979. The dividends can only be paid out of the earnings. Section 7, c. 122, Laws 1851, as amended by chapter 564, Laws 1875. If the five-year clause be construed as an estimated time for the
60 maturity of the certificate, then the certificate conforms to the general scheme of the organization and to the statutes. The authority to issue a certificate with a fixed period of maturity is not expressly given, either by the statute or by the articles of association or by-laws of the society. We are of the opinion that the defendant did not possess the power or authority to issue a certificate containing a fixed maturity period, and that the clause in the certificate in question should be construed as an estimated period of maturity. The amount actually earned by the certificate at the time it was presented by the plaintiff for payment was only $371.

"The judgment should be reversed, and a new trial granted, costs to abide the event, unless the plaintiff, within twenty days, stipulates to reduce the recovery of damages to $371, and interest thereon from December 2, 1894; and, in that event, the judgment be so modified, and, as modified, affirmed, without costs of this appeal to either party.

"A like disposition should be made of the case of Church *vs.* Same Defendant, *infra*.

"All concur."

D. A. Pierce, being duly sworn, deposes and saith as follows:

I reside in the city of Syracuse, N. Y., and am an attorney-at-law. I was admitted to practice in New York in 1884, and have been practicing law in said State ever since. I am the general attorney and one of the directors of the defendant association, and have been its general attorney since April, 1890. I am familiar with the laws of the State of New York in relation to building and loan associa-

tions, and with the law generally applicable to such associations. I have made such laws a special study on account of my connection as general attorney with defendant association, my duties as such having taken practically all of my time during a number of years past.

The defendant is a corporation, and was incorporated in March, 1890, under chapter 122 of the Laws of 1851 of the State of
61 New York, as amended by chapter 564 of the Laws of 1875 of said State. I have an exemplified copy of said laws, and hereby produce the same.

Introduced and marked "Ex. I."

There has been no change in said law of 1851, as amended by said law of 1875, so far as the fundamental acts and operations of associations incorporated thereunder are concerned.

I am familiar with the defendant's articles of incorporation and by-laws, and all provisions thereof.

Under the statute under which the defendant corporation is incorporated, and the defendant's articles of incorporation and by-laws, and the decisions of the courts of the State of New York, the defendant association is not bound to mature its stock within the time specified, if any, on the face of the certificates, say seventy-eight months, or any other fixed period, regardless of the actual value of said stock at the expiration of said fixed period, said value depending, of course, upon the payment of dues made thereon and their *pro rata* share of the earnings; that any period of maturity fixed or indicated in the certificates of stock in any way, is simply an estimated period, and that the association is not required to pay the face value thereof at the expiration of any such period, unless the amount paid in thereon, together with the earnings apportioned thereto, shall equal the par value of the shares. I base my opinion on the statute under which the defendant is incorporated, its articles of incorporation and by-laws, and the decision of the supreme court of the State of New York in the case of O'Malley *vs.* People's Building, Loan and Savings Association, 92 Hun., 572, and similar decisions of other States under like statutes.

STATE of SOUTH CAROLINA,
County of Greenville.

In the Court of Common Pleas.

DAVID W. EBAUGH, Plaintiff,
against
EASTERN BUILDING AND LOAN ASSOCIATION, Defendant.

STATE OF NEW YORK,
County of Onondaga, } *ss:*

62 David C. Visscher, being duly sworn, says that he is the actuary and assistant secretary of the said Eastern Building and Loan Association of Syracuse, New York; and has been such for the past twenty months; and has been connected with said asso-

ciation for the past eight years, and as such assistant secretary has charge of all the books, papers and documents of said association. That Charles A. Pooler, who is secretary and general manager of said association, is seriously ill at his home in the city of Syracuse, New York, and has been confined to his home for over a month; and that it would be impossible at this time to obtain his evidence and affidavit for use in the trial of this case before the master.

Deponent further says that he knows of the certificate of stock issued to D. W. Ebaugh, bearing date 1st day of April, 1892, and is thoroughly acquainted with all the subsequent transactions had between said association and said Ebaugh up to the present time. Deponent says that he knows the condition and value of said stock; the payments which have been made thereon, and the sums deducted therefrom for the expenses of said association; and all other matters relating to the same.

Deponent further says that during the month of March or April of the year 1892, the defendant association had no agent authorized, or instructed, or directed by it to make any representations or statement to said Ebaugh, or any other person, as to the effect of the contract which said Ebaugh, or any other member, might enter into with said defendant; and especially that said defendant association had no agent or representative who was authorized to state that this stock, or any of its stock, would, upon paying at the rate of seventy-five cents per month for seventy-eight consecutive months, mature said stock, or that the company would pay to the said Ebaugh the full par value of each share of stock, to wit: $100; and that no agent had any authority to represent that such stipulation would be binding upon the defendant company, and that the same is valid under the laws of the State of New York; and that until
63 this suit was brought, the defendant and its various officers never knew that the plaintiff claimed that any such representations were made; and if such representations were made by any person to said Ebaugh, the same were made without the knowledge of this defendant, or of any of its officers, and without any authority, right or power from this defendant to make any such statements or representations to the plaintiff to induce him to subscribe for the shares of stock in controversy in this case.

Deponent further says that this defendant never knew, when said plaintiff was making his payments on said stock, that the plaintiff relied upon the representations stated in the complaint in this action; and that the defendant never knew that the payments made by plaintiff to defendant were made under any misapprehension as to the effect or validity of any contract that was made and entered into between the said Ebaugh and this defendant.

Deponent further says that the defendant has never declined to perform its agreement with the plaintiff in this action; but is at all times ready and willing, and has always been, to carry out the contract which it made with the plaintiff in all respects; that the defendant has never declined to give to the plaintiff a statement as to how much money he may expect under his said contract, but, on the contrary, has advised the plaintiff that his stock would be paid

in its order out of one-half of the monthly receipts applicable to withdrawal and matured stock; and that no distinction has ever been made between plaintiff's claim under his certificate of stock and similar claims of other shareholders of the defendant association.

Deponent further says that the defendant company has never endeavored by various devices to depress the value of the plaintiff's stock in order to secure from him a surrender of his rights against the defendant company for a very inadequate consideration; and that the defendant has never denied its liability to the plaintiff according to the terms of the contract, but, on the contrary, has
64 insisted that this construction of the contract was right, and that the rights of the plaintiff and of the defendant were each measured by the terms of such contract.

The deponent further says that at the time this action was commenced, the plaintiff's stock had not matured and become worth the sum of $100 per share; that said stock has not yet matured and become worth $100 per share, together with a full proportion of earnings of the defendant to which the same is entitled, less the *pro rata* share of expenses and losses of the defendant association properly chargeable against said stock; that deponent has charge of the withdrawal list of the defendant association, and that on October 19, 1898, the plaintiff's certificate of stock was received at the home office of the defendant in the city of Syracuse, New York, and placed on file on the withdrawal list of the defendant association as of the date of October 19, 1898, that being the exact date on which the same was received by defendant association; that accompanying said certificate of stock was a letter from plaintiff, as follows:

"GREENVILLE, S. C., *Oct.* 15, 1898.

"Eastern Building and Loan Association, Syracuse, N. Y.

"DEAR SIRS: In reply to your favor of the 12th inst., please find certificate No. 12170 enclosed, and signed as directed. Kindly forward check at your earliest convenience for amount. Please acknowledge receipt of same, and oblige,

"Yours truly, D. W. EBAUGH."

That prior thereto, and on October 12, 1898, the defendant association had written to said D. W. Ebaugh at Greenville, S. C., a letter as follows:

"OCTOBER 12, 1898.

"Mr. D. W. Ebaugh, Greenville, S. C.

"DEAR SIR: Replying to your favor of the 11th inst., I beg to say it is not necessary that any amount be filled in the with-
65 drawal blank on your certificate; simply sign your name the same as the certificate is made out on the line opposite the word 'seal,' and have your signature witnessed. Upon receipt of your certificate, proper acknowledgment will be forwarded.

"Yours truly, N. C. VISSCHER,

"*Assistant Secretary.*"

Deponent further says that said certificate of plaintiff's so received by said association bore upon the back the following receipt, to wit:

"The within-mentioned shares of stock in the Eastern Building and Loan Association of Syracuse, New York, are hereby withdrawn; and I have this day received the sum of $— in full of the amount due me by reason of said withdrawal.

"Dated at Greenville, S. C., October 15, 1898.

"D. W. EBAUGH. [SEAL.]

"Witness:

"FRANK NICHOLS."

That previous to that time the plaintiff had written to the defendant association, under date of September 5, and soon thereafter the association wrote Mr. Ebaugh as follows:

"Mr. D. W. Ebaugh, Greenville, S. C.

"DEAR SIR: In reply to your favor dated September 5, I beg to say that if you desire to file your certificate for withdrawal it will be necessary for you to forward the same to this office, properly receipted in the withdrawal space on the back thereof. Upon its receipt, if in good standing, it will be filed and proper acknowledgment forwarded you.

"It will be some time, however, before you can expect payment of the withdrawal on account of the large number already on file.

"Yours truly, N. C. VISSCHER,

"*Assistant Secretary.*"

66 That prior to September 24, 1898, the defendant association had received from Mr. Ebaugh, the plaintiff, a letter under date of September 20, enclosing express money order for $7.50, to which the association responded as follows:

"SEPTEMBER 24, 1898.

"Mr. D. W. Ebaugh, Greenville, S. C.

"DEAR SIR: Your favor of the 20th inst., enclosing express money order for $7.50, at hand. You state in your letter that this amount finishes your contract, and request us to forward to you check for $1,000. You were duly notified in communication, under date of August 12, that the certificate would not mature in the original specified time of seventy-eight months; and it will be necessary for you to continue payments beyond that period in order to secure the maturity value. The facts given you in that letter apply to the present time, and you must either continue your payments or file the certificate for withdrawal.

"Yours truly, N. C. VISSCHER,

"*Assistant Secretary.*"

On October 19, 1898, the association wrote plaintiff as follows:

"Mr. D. W. Ebaugh, Greenville, S. C.

"DEAR SIR: I beg to acknowledge the receipt of your certificate

No. 12170, for withdrawal; the same has been filed and will be paid in its regular order, as provided by the articles of incorporation and by-laws. The payment of withdrawals is governed by the rules of the association and not in accordance to the demands of the membership; as the constitution and by-laws provide that but one-half of the receipts upon stock payments shall be used for that purpose, as appears below in printed form, the balance being permitted to be used to carry on the business of the association with its members who do not desire to withdraw.

"Yours truly,

N. C. VISSCHER,
"*Assistant Secretary.*"

67 That on August 12, 1898, the association mailed a letter to the plaintiff as follows:

"D. W. Ebaugh, Greenville, S. C.

"DEAR SIR: I am obliged to inform you that the earnings of the association have been insufficient to mature your stock in the time estimated, seventy-eight months, by a large margin. It, therefore, occupies no different position in its rights than the same class of certificates issued since July, 1894, which are estimated to mature in one hundred months, with one hundred regular monthly payments made thereon. If you desire to realize the maturity of this stock, it will be necessary for you to continue payments thereon for a period as estimated. While the inability of the association to fulfill the erroneous estimates assumed under the earlier management of the company, we appreciate is a disappointment to the holders thereof, still, nevertheless, they should give consideration to the fact that to have carried out such an expectation would have been not only far more than has ever been accomplished by any other building and loan association, but the further fact that if these certificates mature in one hundred months, with one hundred payments, they will yield in profits quite as much as is being accomplished by any other company.

"Yours truly,

C. A. POOLER,
"*Secretary and General Manager.*"

Deponent further says that after plaintiff's stock certificate was received, as aforesaid, the same was, as has been stated, placed upon the regular withdrawal list, where it now remains, waiting its order in payment with the other certificates filed for withdrawal by members of this association; and that the same has so remained on file ever since its receipt on October 19, 1898, and has never been withdrawn or requested to be withdrawn by the plaintiff; that the total value of plaintiff's certificate on the 1st day of January, 1899,
68 was $600.40; that the amount of withdrawals on file and unpaid on January 1st, 1899, was $390,000; and that when plaintiff filed his certificate for withdrawal on October 19, 1898, there was, in round numbers, $350,000 of withdrawals on file, received and filed by the defendant prior to the receipt and filing of plaintiff's certificate of stock; that the association, under its articles and by-laws, is not required to pay out upon withdrawal and matured stock

more than one-half of its monthly receipts on stock payments; that the average monthly payments on withdrawals for the six months preceding January 1st, 1899, was $3,514.58; that the average monthly payments on withdrawals for the six months since January 1, 1899, amounts to $2,599.19; and that plaintiff's withdrawal will be paid in its regular order when reached upon the withdrawal li-ts of said association. That plaintiff's membership in said association has never ceased or terminated; and that plaintiff is entitled only to the book value of his stock, as appears upon the books of the defendant association, when reached under the rules and regulations of the defendant in its regular order of payment.

(Signed) NATHAN C. VISSCHER.

Subscribed and sworn to before me, this 25th day of July, 1899.

(Signed) NELLIE A. POTTER,
Notary Public, Onondaga Co., N. Y.

Articles of Incorporation.

Whereas, articles of incorporation of the Eastern Building and Loan Association of Syracuse, N. Y., were heretofore filed with the clerk of the county of Onondaga, in the State of New York, under and in pursuance of an act of the legislature of the State of New York, entitled "An act for the incorporation of building, mutual loan and accumulating-fund associations," and known as chapter 122 of the Laws of 1851, and the acts amendatory thereof, and

Whereas, certain informalities and omissions exist in the original certificate of incorporation,

69 Now, therefore, we, the directors of said corporation, under and in pursuance of an act of the legislature of the State of New York, passed April 5th, 1870, entitled "An act for the relief of corporations organized under general laws," do hereby make and file the following amended certificate of incorporation, viz:

Articles of Incorporation.

We, the undersigned, hereby associate ourselves together and agree to become incorporated under the provisions of the act entitled "An act for the incorporation of building, mutual loan and accumulating, fund associations," and known as chapter 122 of the Laws of 1851, and the acts amendatory thereof and supplementary thereto, under the name of the Eastern Building and Loan Association of Syracuse, N. Y., for the purpose of engaging in and carrying on business as hereinafter mentioned.

I.

The name of this corporation shall be the Eastern Building and Loan Association of Syracuse, N. Y.

II.

This association is formed for the purpose of purchasing real estate; for the erection of buildings or other improvement, and the

improvement of lands; for aiding members in acquiring or improving real estate, or of removing encumbrances thereon by means of advances; for accumulating a fund for the benefit of members who do not obtain advances; and for the purpose of conducting the general business of a building and loan association and providing the advantages usually expected from savings banks and other institutions of like character.

III.

70 The principal place of business of this association shall be located at Syracuse, N. Y. But branches or agencies may be established and business done in any part of the State of New York or in any State or Territory of the United States as the board of directors may direct.

IV.

The time of the regular meeting of this corporation shall be the second Monday in May of each and every year, and special meetings may be called at any time upon the written call of a majority of the directors of this association or of ten or more shareholders therein. A quorum shall consist of not less than a representation of at least five hundred (500) shares of stock of said association; and not less than one-half the number of said directors in cases where a directors' meeting shall be found necessary.

V.

The qualification of members shall be as follows: Any person upwards of twenty-one years of age, or parents or guardians of children, may become members of this association, and shall become such upon subscribing for two or more shares of stock in this association, as prescribed by the by-laws thereof.

VI.

The management of all the business of the association shall be vested in a board of nine directors, who shall be chosen at each regular meeting. Said board shall have full power and authority to fill all vacancies, and make such by-laws, rules and regulations for the general management and conduct of the business of this association as they may deem necessary. The officers of this association shall consist of a president, vice-president, secretary and general manager (combined), and treasurer, who shall be chosen by and from the board of directors at their first regular meeting after
71 the annual meeting of the association; also an attorney, who shall at the same time be chosen by the board of directors from their number or from one of the stockholders. Said officers to receive the vote of a majority of said board present at any meeting. And said board of directors shall in the same manner also designate a trustee, who shall be chosen at its first regular meeting.

Any of the officers, the trustee and attorney of this association, may be removed and suspended from office by a majority of the board of directors and a majority of the number of shares of stock of said association.

VII.

The duties of the said several officials shall be as follows: The directors shall pass upon the sufficiency of all property offered as security for loans, and attend generally to the financial affairs of the association, as provided by the by-laws to be hereafter adopted.

It shall be the duty of the president to preside at all meetings of the shareholders and of the board of directors; to sign certificates of stock and sign all releases of mortgages; and he shall perform all other duties pertaining to said office as provided by the by-laws to be hereafter adopted.

The vice-president shall perform all the duties of the president in his absence.

It shall be the duty of the secretary and general manager to attend all meetings of the shareholders and board of directors; to receive all moneys paid into the association and pay the same over to the treasurer, and take his receipt therefor; he shall keep all accounts of the association; conduct all correspondence; sign all orders on the treasurer, and sign all certificates of stock, under the direction of the board of directors. Whenever required by the board, he shall submit a statement of the financial affairs of the association. The books of the association shall be kept by him, and at all times be subject to the inspection of the board. He shall receive
72 from the attorney, after being recorded, all deeds or other documents pertaining to the business of the association, and make proper entry of the same in books kept for that purpose. He shall attend to all printing and publication and have general supervision over all agents or agencies of this association, and any further duties as may be prescribed by the by-laws to be adopted.

It shall be the duty of the treasurer to receive all moneys from the secretary and deposit the same in the name of the association in such bank as shall be designated by the board of directors. He shall keep correct account of all moneys received and paid out by him. He shall make to the board of directors when required a statement in writing of the full business of his office.

It shall be the duty of the attorney to examine all abstracts and records relating to the title of real estate offered as security for loans and certify in writing to the board of directors all facts that might affect the interests of the association in case such security may be accepted. He shall prepare all papers incident to making loans and secure loans by the association and cause them to be properly executed, and such other duties as may be required by the by-laws of this association.

VIII.

All officers holding responsible positions shall execute to the association such bonds for the faithful performance of their duties as the board of directors may require.

IX.

The entrance fee of new members and new shares shall be one

dollar ($1.00) per share of stock in said association. The monthly dues per share shall be seventy-five cents ($.75).

There shall be a transfer fee of two dollars ($2.00) on each and every certificate of shares transferred.

73 The fines for non-payment of dues shall be ten cents ($.10) on each and every share of stock unpledged, and twenty cents ($.20) on all stock pledged for each and every month the payment may be in arrears.

In case a monthly payment on any share shall become past due and payable for a period of six months or more, such share shall be sold for the purpose of paying the arrearages. The proceeds of the sale shall first be used to pay all back monthly payments and fines, and the balance remaining after paying all accrued fines and monthly payments shall be paid to the member in whose name the stock stands at the time of sale. If the stock brings no more than enough to pay the accrued fines and monthly payments, it shall be bid in by the association and cancelled, and the amount standing to the credit thereof in the loan fund shall be divided among the other shares as profits.

X.

The advances or loans made to any member of this association shall not exceed the face value of the stock owned by him, and except as hereinafter stated shall be upon satisfactory first mortgage, real-estate security, and be under such rules and regulations as the by-laws and the board of directors may require.

Loans may be made upon shares in good standing and in force one year to an amount not exceeding 90 per cent. of the monthly dues paid to the association upon such shares as collateral security, and upon such note, bond or other obligation, or instrument, as the board of directors and by-laws may require.

A uniform premium of 10 per cent. shall be paid and allowed by the borrower upon each loan; and upon all loans the borrower shall pay interest at the rate of 5 per cent. per annum as a redemption fee, and the same shall be paid on the last Saturday of each month during the continuance of said loan at the principal office of the

74 association. In case the monthly instalments on loans are not paid as aforesaid, then interest at the rate of 6 per cent. per annum, payable semi-annually, shall be collectable thereon; and in case default shall be made in the payment of the regular monthly instalments, fees or dues, the association may compel payment of principal, interest and premium, assessments, fees or dues, by proceeding upon the note or other obligation and mortgage, which shall at once become fully due and payable, and the association may cancel and treat as forfeited the shareholder's shares of stock, whether deposited as collateral security or not, and all payments previously made thereon shall be forfeited to the association.

Pledged shares may be transferred, upon consent of the association, by transferring the mortgage security upon payment of the fee therefor, provided all assessments, instalments, dues and charges thereon are paid to date, and subject to such other regulations, if any, as the by-laws may provide.

Any shareholder may have his mortgage transferred or changed from one piece of property to another by giving thirty days' notice in writing, the shareholder to pay all expenses incurred by the transfer of the same.

Loans may be prepaid and the mortgaged property released upon application to the association and giving thirty days' notice in writing of the intention. An equitable discount shall be allowed therefor, to be determined by the board of directors.

XI.

Unpledged shares may be transferred upon consent of the association, upon payment of the fee therefor, provided all dues and claims thereon have been paid to date.

XII.

Shares which are not pledged may be withdrawn before
75 maturity, provided the same are in good standing and all dues and fines have been paid to date. The association shall have the right of at least thirty days' prior notice of intention to withdraw. Upon such withdrawal, the holder will be entitled to receive thereon the amount of the monthly instalments that have been paid, with such additional interest, if any, as the by-laws may provide, except that the same shall not exceed the net earnings of said stock. But in no event shall the association be required to pay to withdrawing members more than one-half of the net receipts of the monthly instalments paid in during the month in which the withdrawals occur. In no case shall a withdrawal from the loan fund exceed the amount of the instalments paid thereto, together with the estimated amount of the earnings upon the same.

XIII.

The association shall have the right to mature any shares of one year's standing, and to issue in the place thereof paid-up certificates of shares, payable at maturity, with interest at the rate of 6 per cent. per annum, or at maturity of stock in pledge, payable at maturity of loan.

It shall also have the right to cancel any unpledged certificate of shares after it has been in force three years, upon the payment to the holder of the total amount of instalments paid thereon, together with interest thereon at the rate of 8 per cent. per annum to date of cancellation.

XIV.

The qualification of voters at a meeting shall be that they shall be members in good standing, as provided by the by-laws, and be entitled to one vote for each share of stock held. Voting shall be by ballot, and the highest number of votes shall elect.

Any member may authorize another member by written proxy to vote his stock at any one meeting, provided such proxy shall
76 specify the particular meeting at which the same is to be used, and the same shall be filed with the secretary at the home

office at least twenty days before the opening of such meeting. In all other cases the proxy given with the application for stock shall be operative.

XV.

The amount to be paid to the owners of shares at maturity shall be one hundred dollars ($100) per share.

XVI.

The by-laws of this association shall not be amended except at an annual meeting of said association and by a majority vote of the stock outstanding.

XVII.

The amount of capital stock of this association shall be fifty millions of dollars ($50,000,000), divided into shares of one hundred dollars ($100) each, as provided by the by-laws.

The funds of this association shall be divided into two classes, which shall be called, respectively, the loan fund and the expense fund. The expense fund shall consist of all admission, transfer, insurance, abstract and attorney's fees, amounts paid for insurance, or taxes on property on which loans have been made, fees, costs and disbursements of foreclosure, together with ten cents per share per month from the monthly payment on stock, and these funds so constituted shall be devoted to the payment of operating expenses, and said insurance and taxes. The loan fund shall consist of all receipts which do not go into the expense fund, as hereinbefore provided, together with all interests and accumulations from whatever source.

No money can be drawn from the loan fund for any other
77 purpose than the making of loans, on security, as provided by the by-laws, and to pay amounts due withdrawing shareholders.

The funds of the association not required for advances on shares may be invested by the board of directors in such securities as the savings banks of the State of New York are permitted to take, or deposited at interest in the savings banks, trust companies or duly incorporated banks of said State, and which are in good standing.

XVIII.

The stock of this association may be issued in series, if the board of directors may so decide.

The directors of this association may enter into such contracts and agreements, and appoint such agents for its business management, as they may deem for the best interests of its affairs.

XIX.

These articles of incorporation may be amended at any annual or special meeting of the association, provided the same is previously

endorsed by resolution of the board of directors, and adopted by a majority vote of stock of the association.

Dated Syracuse, February 22d, 1890.

HENRY H. LOOMIS.
DWIGHT H. MURRAY.
JNO. J. W. REYNOLDS.
LUCIUS M. KINNE.
WILLIAM H. EMORY.
CHARLES A. POOLER.
ALEX. H. HUBBS.
ARTHUR B. KINNE.
ROBERT W. ANDREWS.

STATE OF NEW YORK, } ss:
Onondaga County, }

On this February 22d, 1890, before me, the subscriber, per-
78 sonally appeared Henry H. Loomis, Dwight H. Murray, Jno. J. W. Reynolds, Lucius M. Kinne, William H. Emory, Charles A. Pooler, Alexander H. Hubbs, Arthur B. Kinne and Robert W. Andrews, to me known to be the persons named in, and who executed, the foregoing certificate, and duly and severally acknowledged that they executed the same.

E. A. CHRISTY,
Com'r of Deeds, Syracuse, N. Y.

The foregoing articles duplicated in the original, signed and dated as follows:

Dated Syracuse, February 22d, 1890.

HENRY H. LOOMIS, *President.*
DWIGHT H. MURRAY,
Vice-President.
JNO. J. W. REYNOLDS,
Sec. and Gen. M'g'r.
LUCIUS M. KINNE, *Treasurer.*
SAMUEL R. STEARN, *Attorney.*
WILLIAM H. EMORY,
CHARLES A. POOLER,
ALEXANDER H. HUBBS,
ARTHUR B. KINNE,
ROBERT W. ANDREWS, *Directors.*

SYRACUSE, *February* 22, 1890.

At a meeting of the undersigned incorporation of the Eastern Building and Loan Association, held at the rooms of the State Bank of Syracuse, in the Syracuse Savings Bank building, Syracuse, N. Y., the following proceedings were had:

Said Eastern Building and Loan Association effected a temporary organization by calling a meeting to order at 4 p. m. by electing as temporary president Henry H. Loomis and John J. W. Reynolds secretary.

The articles of incorporation, a copy of which is hereto annexed, were duly signed and executed by all present.

By-laws were adopted after a full discussion of the same.
79 The following officers were then elected, as provided by said articles of incorporation and said by-laws:

Henry H. Loomis, president.
Dwight H. Murray, vice-president.
John J. W. Reynolds, secretary and general manager.
Lucius M. Kinne, treasurer.
Samuel R. Stearn, attorney.

Directors: Henry H. Loomis, John J. W. Reynolds, Alexander H. Hubbs, William H. Emory, Dwight H. Murray, Lucius M. Kinne, Charles A. Pooler, Robert W. Andrews, Arthur B. Kinne.

The place of business designated as Syracuse, N. Y., and the location at present 83, 84 and 85 Weiting block.

The articles hereto annexed are a true copy of the certificate of incorporation signed by the foregoing members and incorporators.

JNO. J. W. REYNOLDS,
Secretary and General Manager.

Verified.

Eastern Building and Loan Association.

BY-LAWS.

ARTICLE I.

Name, Object, Location, and Duration.

SECTION 1. This association shall be known as the Eastern Building and Loan Association of Syracuse, N. Y.

SEC. 2. Its object is to afford its members a safe and profitable investment of their savings, to facilitate the purchase and improvement of real estate and provide the advantages usually expected from savings banks and other institutions of like character.

SEC. 3. The principal place of business of this association shall be located at Syracuse, N. Y., but the branches or agencies may be located and business done in any part of the State of New York, or in any State or Territory of the United States where no legal
80 prohibition exists, by authority of the board of directors, to be evidenced by a vote of the majority of the board, and spread upon its records.

SEC. 4. This association shall continue for forty years.

ARTICLE II.

Capital Stock.

SECTION 1. The capital stock of this association shall be fifty million dollars, divided into shares of one hundred dollars each.

SEC. 2. All stock shall be issued in monthly series, dated on the first day of the month of its issue. Each shareholder in good standing shall be entitled to one vote for each share of stock held by him, and on which all dues have been paid, at all meetings of the shareholders.

ARTICLE III.

Directors and Officers.

SECTION 1. There shall be elected by ballot nine directors of this association, at the annual meeting thereof, by a majority of the stock represented and voting.

SEC. 2. The officers of this association shall consist of president, vice-president, secretary and general manager (combined) and treasurer, to be elected by and from the board of directors. All vacancies in the board of directors caused by death, resignation or otherwise, and all vacancies from any cause, shall be filled by the board of directors until the next annual meeting of the association.

SEC. 3. The officers and directors of the association shall receive such salaries as the board of directors may deem advisable, provided the same must always be paid from the expense fund.

SEC. 4. All bonds to this association from any officer shall be first approved by the board of directors.

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ARTICLE IV.

SECTION 1. The annual meeting of the stockholders shall be held at the home office of the association on the second Monday of May of each year, commencing with the year 1891, between 2 and 4 o'clock p. m., of which due notice shall be given according to law.

ARTICLE V.

Board of Directors, Meetings, and Duties.

SECTION 1. Stated meetings of the board shall be held monthly on the first Tuesday of each month. Special meetings may be called by the secretary, or by request of two or more members of the board.

SEC. 2. It shall be the duty of the board of directors to pass upon the sufficiency of all property offered as mortgage security for loans, and attend generally to the financial affairs of the association. They shall have the management of the association not otherwise provided for in the by-laws, and the right to disburse such amounts as may be necessary to properly conduct the business of the association. They shall cause the secretary to mail to each shareholder, after each annual meeting, a general statement of the business of the preceding year and a report of the financial condition of the association, as found by them after a thorough examination. A majority of the board shall constitute a quorum for the transaction of any business.

* * * * * * *

ARTICLE VII.

Secretary and General Manager.

SECTION 1. It shall be the duty of the secretary and general manager to attend all meetings of the shareholders and board of directors; to receive all money paid into the association, and to pay the same

over from time to time to the treasurer, and take his re-
82 ceipts therefor, and keep all accounts of the association between the association and shareholders; issue all notices; conduct all correspondence; draw and sign all orders on the treasurer, and sign all certificates of stock under the direction of the board.

SEC. 2. Whenever required by the board, he shall submit a statement in writing of the financial affairs of the association. The books of the association shall be kept by him, and at all times be subject to the inspection of the board. He shall, under the direction of the board of directors, see to the settlement of all claims and bills, and shall keep insured all interest the association may have in any building or property liable to loss by fire; with the assistance of the attorney of the association, he shall protect its interests in all tax sales or forfeitures or foreclosures of property in which it may hold any interest, and for these purposes is authorized to draw on the treasurer without further action of the board of directors, such payments to be reported at the next meeting of the board of directors. He shall receive from the attorney, after being recorded, all deeds or other documents pertaining to the business of the association, and make proper entry of the same in books kept for that purpose. He shall give bond, to be approved by the board of directors, for the benefit of the association, conditioned for the faithful performance of the duties of his office and the direction of the board of directors.

SEC. 3. It shall be his duty, as general manager, to attend to all advertising, printing and publications; look after all bonds of agents, local and special; look after all property that is offered for security and report the same to the board, and to have the general supervision over all agencies, to appoint agents, assistants and other necessary help.

ARTICLE VIII.

Treasurer.

83 SECTION 1. It shall be the duty of the treasurer to receive all moneys from the secretary and deposit the same in the name of the association in such bank as shall be designated by the board of directors, signed by the secretary. He shall keep correct account of all moneys received and paid out by him. He shall deposit with the trustee all abstracts of title, deeds, bonds, mortgages, contracts and other securities belonging to the association. He shall make to the board of directors, when required, a statement in writing or otherwise of the full business of his office. He shall furnish a satisfactory bond, to be approved by the board of directors, for the benefit of the association, conditioned for the faithful performance of the duties of his office, in conformity with the by-laws and the order of the board of directors.

ARTICLE IX.

Attorney.

SECTION 1. It shall be the duty of the attorney to examine all abstracts and records relating to the title of real estate offered as security for loans, and certify in writing to the board of directors all facts that might affect the interests of the association in case such security may be accepted.

SEC. 2. He shall prepare all papers incident to making sales and securing loans by the association, cause them to be properly executed, file the same for record in the proper office of the county, and, when so recorded, deliver the same to the secretary, and, in general, do and perform all things incident to his office.

ARTICLE X.

Official Bonds.

SECTION 1. All officers holding responsible positions shall execute to the association such bonds for the faithful performance of their duties as the board of directors may require.

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ARTICLE XI.

Funds.

SECTION 1. The receipts of said association shall be divided into two classes, which shall be called respectively the loan fund and expense fund. The expense fund shall consist of all admission, transfer, insurance, abstract and attorney's fees, amounts paid for insurance or taxes on property on which loans have been made, fees, costs and disbursements of foreclosure, together with ten cents per share per month from the monthly payments on stock, and this fund so constituted shall be devoted to the payment of operating expenses and said insurance and taxes.

SEC. 2. The loan fund shall consist of all receipts which do not go to the expense fund, as hereinbefore provided, together with all interest, fines, earnings and accumulations from whatever source. No money can be drawn from the loan fund for any other purpose than the making of loans on security, as provided by the by-laws, and to pay amounts due withdrawing shareholders.

ARTICLE XII.

Eligibility.

SECTION 1. All new shareholders elected or appointed as directors or officers of this association shall concur in and accept the previous resolutions, agreements and obligations of said association, and shall only become eligible to such position after having performed all personal obligations agreed upon prior to their election or appointment.

SEC. 2. Persons not of lawful age can only become shareholders

through their lawfully appointed guardians, who shall sign the application as provided by law.

ARTICLE XIII.

Elections and Inspectors.

85 SECTION 1. At the stated meeting of the board of directors next preceding the day appointed for the annual meeting there shall be elected by the board of directors three shareholders, not candidates for election, to act as inspectors thereof, who shall receive the votes, count the same, and report in writing the names of the persons having the greatest number of votes, who thereupon shall by the president be declared duly elected, whereupon the secretary shall give notice to such directors.

Any member may authorize another member by written proxy to vote his stock, provided that all proxies shall be filed with the secretary at the home office at least twenty days before the opening of the meeting at which they are to be used.

ARTICLE XIV.

Contract of Members.

SECTION 1. The terms and conditions expressed in the certificates of stock, in connection with the application for membership, and the by-laws of this association, form the contract between this association and each shareholder therein.

SEC. 2. All persons desiring to become shareholders of this association must fill out, sign and deliver to the secretary an application according to the form adopted by the association, which application shall be a part of said contract with this association. Such applicant shall also pay a membership fee of one dollar per share for each and every share held by him.

SEC. 3. All loans made by this association shall be upon satisfactory note and first mortgage, secured on real estate, together with fire-insurance policy in some approved company, if upon improved property, and for every one hundred dollars of loan made to a shareholder, who shall in addition thereto transfer in pledge to the association one share of the stock held by said shareholder as collateral
86 security on all loans made by the association to a shareholder. Said shareholder shall pay an interest of five per cent. per annum and a premium of five per cent. per annum of all said loans. All interest and stock payments shall be paid on the last Saturday of each month during the continuance of said loan, and at the same time the shareholders not borrowing shall pay their monthly payments at the principal office of the association.

SEC. 4. Abstracts of title must be furnished by the borrower; also the legal examination and opinion of the attorney of the association that the title to the property offered as security is clear and owned in fee-simple, and he must so report. All such abstracts, searches and attorney's fees, and all fees for recording, drawing and cancelling mortgage, are to be paid by the borrower.

SEC. 5. Borrowing members who shall neglect to pay any instalments on stock and interest on their loans, as the same become due, shall pay to the association a fine of twenty cents per month on each one hundred dollars that they have borrowed from the association. Non-borrowing members who shall neglect to pay their monthly instalments promptly shall pay to the association a fine of ten cents per month on each share of stock owned by them.

SEC. 6. Should a shareholder whose property is mortgaged to the association desire to release the same by prepayment of his indebtedness, he may, on application to the association, be allowed to do so by giving thirty days' notice in writing of such intention, and be allowed an equitable discount therefor, to be fixed by the board of directors.

SEC. 7. Any shareholder may have his mortgage transferred from one piece of property to another by giving thirty days' notice in writing, the shareholder to pay all expenses incurred by the transfer of the same.

SEC. 8. Any shareholder may sell or transfer property mortgaged to the association, and the purchasers must assume all stip-
87 ulations, agreements and conditions of the original mortgagor by a proper instrument in writing to be paid for at his own expense. Said person purchasing must also purchase the shares held by said shareholder, which will be transferred on the books of the association to said purchaser, all assessments or instalments thereon being paid up to time of transfer, upon payment of fees therefor; or the association may accept a new mortgage from said purchaser to secure the former loan, until the expiration of said loan, upon the same or other sufficient property, upon payment of all fees and expenses thereof.

SEC. 9. All deeds, notes, leases, or other written instruments requiring to be executed, and all satisfactions and releases of mortgages and other indebtedness ordered by the board of directors, shall be signed in the name of the association by the president, or, in his absence, by the vice-president, and countersigned by the secretary, and, when necessary, acknowledged by the president and secretary of the association in their official capacity, and have the corporate seal attached.

SEC. 10. If any shareholder or any person shall neglect to pay the interest or instalment on his loan, or the regular monthly instalments, fees or dues for six (6) months, the secretary may compel payment of principal, interest and premiums, assessments, fees or dues, by proceeding on his note and mortgage, which shall at once become fully due and payable, and the association may cancel and treat as forfeited the said shareholder's shares of stock, whether deposited as collateral security or not, and all payments previously made thereon shall be forfeited to the association. Punctuality and strict performance on the part of all members, borrowers and shareholders, in payment of fines, dues, interest, loans and premiums, are made the essence of the contract.

SEC. 11. Any shareholder may pay his instalments, interest and

premium in advance, or deposit with the association a certain
88 sum to be used for such payments as they may fall due, and
the association will receipt for the same and notify when said deposit is exhausted.

If members make payments in advance for a period of six months and not over two years, a discount may be allowed at the rate of seven per cent. per annum for the time each payment is actually advanced.

SEC. 12. Any shareholder who has made a loan by giving taxable property as a security shall be bound to pay all State or city or other taxes or assessments as they become due, in addition to all other payments, and his failure to do so will make his loans, notes, mortgages, premiums and interest at once fully due and payable at the option of the board of directors.

SEC. 13. Each share of stock shall be charged with any and all amounts that may be owing from the shareholder or of his assigns to the association, whether in dues, loans, fines, interest or premiums, and all certificates of stock in said association shall, whether mentioned therein or not, be subject to a lien thereon, to secure any such indebtedness, and the right to deduct and withhold the amount of any such indebtedness is hereby expressly reserved to the association.

SEC. 14. All shareholders shall pay, or cause to be paid, a monthly instalment of seventy-five cents on each share named in their certificate, until the same shall be fully paid; said instalment to be paid to the association on or before the last Saturday of each month. Shareholders are required to pay monthly instalments without notice.

SEC. 15. In case of change of residence or post-office address, name of the shareholder, or his or her legal representative, notice thereof, in writing, shall be given at once to the secretary of the association.

SEC. 16. All remittances for advance instalments, premiums, monthly instalments, fines and penalties, interest and premiums, and
all other payments, shall be made to the secretary of the as-
89 sociation at the home office, and in registered letter, express or money order, or drafts. Individual checks shall not be receivable.

SEC. 17. Should the board of directors require further evidence of a claim than is given in the proof furnished on the same, it hereby reserves the right to extend the time of payment until such necessary proof is furnished and investigation is made. The association shall have sixty days after the filing of the proofs of a claim, and the approval thereof by the board of directors, in which to pay the same, and this applies to claims maturing by death as well as to maturity of stock.

SEC. 18. If shares are withdrawn at any time before maturity, the holders thereof will be entitled to receive the amount paid into the loan fund in monthly payments; after six payments have been made on stock, the holder thereof can withdraw his monthly instalments that have been paid to the loan fund, with interest at the rate of six

per cent. per annum, seven per cent. after two years and eight per cent. after three years.

SEC. 19. Any shareholder wishing to withdraw his stock may be allowed to do so at any time, but the association shall not be required to pay out more than one-half of the net receipts of the monthly instalments paid in that month to withdrawing members.

SEC. 20. The association reserves the right to mature any certificate at any time after one year, and to issue a paid-up certificate of shares, payable at maturity of stock, with interest at the rate of six per cent. per annum, or at maturity of stock in pledge, payable at time of maturity of loan.

The association reserves the right to cancel any unpledged certificate after it has been in force three years, upon the payment to the owner of the total amount of instalments paid thereon, together with eight per cent. per annum as added dividend.

SEC. 21. And it is hereby expressly agreed between all
90 shareholders and this association, that a payment of one hundred dollars per share, named in their certificate, that has been in force till maturity, shall be accepted as full payment of all claims on their certificate or against this association.

SEC. 22. Paid-up and non-assessable stock may be issued and sold at the price of fifty dollars per share, payable on date of issue. Any parties holding such paid-up stock, wanting to withdraw the same before maturity, may do so and receive six per cent. annual interest from the date of issue of said stock.

SEC. 23. Paid-up stock shall be indorsed by the trustee, and cannot be withdrawn for one year from date of issue.

ARTICLE XV.

Loans.

SECTION 1. Each shareholder, for each share named in their certificate, shall be entitled to a loan of one hundred dollars from the association, provided they shall first make application for such a loan upon a blank furnished by the association for that purpose, if the condition of the loan fund in the treasury shall warrant it. All applications for loans shall be filed and numbered consecutively as received, and be examined and approved, or rejected, by the board in their regular order.

SEC. 2. All shares must be in force three months before said shareholder shall be entitled to a loan. All applications for loans are part of the contract of the shareholders with this association. Nothing herein contained shall prevent the board of directors from loaning funds of the association to any member in greater sums than the above, provided upon approved securities.

ARTICLE XVI.

Local Boards.

91 SECTION 1. Whenever sufficient stock has been sold in any town to make it advisable, the members residing in each town

may organize a local board or branch of the association. The officers of the local organization shall consist of from five to nine directors, from whose number shall be elected a president, secretary and treasurer (combined), and attorney; all of whom must be shareholders in the association; these officers shall hold office for one year and until their successors are elected.

SEC. 2. The traveling agents of the association are given authority to appoint the first officers of the local board: Provided, however, that officers so appointed shall only hold office until the members of the local board meet and elect their successors.

SEC. 3. It shall be the duty of the officers of the local board to pass on all applications for loans which are received by the association from members residing in the town where such local board is located, and to protect the interest of the association in all practicable ways.

SEC. 4. Members may, if they so desire, make monthly payments on stock to the local treasurer. But such local treasurer shall be deemed to be the agent of the members and not of the association.

SEC. 5. As soon as the officers of the local board have been appointed or elected and the names of such officers have been certified to the association by a traveling agent or by the local secretary, a local-board charter shall be issued to such board.

SEC. 6. The president of the local board shall call a meeting thereof whenever three members shall request him to do so.

ARTICLE XVII.

By-laws—Amendment.

SECTION 1. No amendment shall be made to these by-
92 laws unless previously indorsed by resolution of the board of directors and adopted by a majority vote of the stock of said corporation.

STATE OF SOUTH CAROLINA, }
County of Greenville. }

In Court of Common Pleas.

DAVID W. EBAUGH, Plaintiff,
against
EASTERN BUILDING AND LOAN ASSOCIATION, Defendant. }

The defendant is a corporation organized under the laws of New York, with its principal place of business in the city of Syracuse. In the early part of the year 1892 it began business in the State of South Carolina, and organized in the city of Greenville a local branch of said association. The plaintiff is a resident of the city of Greenville, in said State. The defendant's agent approached the plaintiff for the purpose of inducing him to become a stockholder in the defendant company. The agent exhibited to the plaintiff a form of

the certificate of stock, which contained, among other things, this promise:

"Eastern Building and Loan Association of Syracuse, New York, agree to pay said shareholder, or his heirs, executors, administrators or assigns, the sum of one hundred dollars for each of said shares, at the end of seventy-eight months."

At the same time the agent exhibited to him certain printed circulars, or literature, of the defendant company. One of these circulars was entitled "The definite contract plan." This circular stated:

"Q. What amount is deposited monthly?
"A. Seventy-five cents per share. * * *
"Q. When will the shares reach their par value?
"A. Shares mature in exactly six and one-half years.
"Q. How much will a member have to pay in altogether?
"A. On a basis of ten shares (one thousand dollars maturity value) he will have paid in five hundred and ninety-five
93 dollars ($595) and receives one thousand dollars." * * *

"All shares on which payments are made are regularly matured at the expiration of seventy-eight months (six and one-half years) from date of certificate. * * *

"*Illustration*

"Showing costs and profits to the investor of ten shares of $1,000, six and a half years, at time of maturity.

"He pays a membership fee of $1.00 per share.....	$10 00
"He pays monthly instalments of $7.50 per month for 78 months, $7.50 x 78.....	585 00
"Total amount invested.....	$595 00
"He receives in cash at maturity.....	1,000 00

* * * "The only association making a contract definite in every particular. * * * Stock matures in seventy-eight months."

On reading the circulars and after listening to the persuasive talk of the agent, the plaintiff was induced to become a subscriber for ten shares of stock. Thereupon the certificate sued upon was issued to him. This certificate is dated on April 1st, 1892. It certifies that "D. W. Ebaugh, of Greenville, county of Greenville, and State of South Carolina, is hereby constituted a shareholder of the Eastern Building and Loan Association of Syracuse, New York, incorporated under the laws of New York, and holds ten shares therein of one hundred dollars each, and in consideration of the membership fee, together with agreements and statements contained in the application for membership in the association, and full compliance with the terms, conditions and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract; and the said Eastern Building and Loan Association of Syracuse, New York, agree to pay to said shareholder, or his heirs,

executors, administrators or assigns, the sum of one hundred
94 dollars for each of said shares at the end of seventy-eight months from the date hereof."

Ebaugh paid the entrance fees, and continued to pay the monthly instalments until seventy-eight months had elapsed. The last payment was made on October 1st, 1898. In subscribing to this stock and in making these payments, Ebaugh trusted to the statements contained in the circular and to the promise made in the certificate. About one month before the last payment was made, the association wrote to Ebaugh, stating that they could not carry out the contract, and stating that they could not pay him one hundred dollars upon the end of seventy-eight months, but that he would have to continue making payments. In reply to this, Ebaugh wrote that he had made a definite contract with the association, and expected them to comply with its terms. A short time after making the last remittance, he signed a blank receipt upon the back of the certificate, and sent the same to the association, with the request that they forward him a check for the money due him. The association refused to make payment, and on January 17, 1899, this action was commenced to recover from the association the sum of one thousand dollars, with interest thereon from October 1st, 1898. Certain property of the defendant company in this State was attached in said action.

The defendant made answer, alleging that there was no contract to mature the stock at a definite period, but that it was only estimated that the stock would be matured in seventy-eight months. It also claims that any promise to mature the stock within a definite time would be contrary to their by-laws and charter, and contrary to the laws of New York.

By agreement of counsel, all issues of law and fact were referred to Oscar Hodges, a member of the bar at Greenville, as special referee. Mr. Hodges took testimony, and heard argument, and
95 filed his report, wherein he concludes "that the plaintiff is entitled to recover judgment against the defendant for the sum of one thousand dollars, with interest from October 15th, 1898, at the rate of seven per cent. per annum, and for the costs of this action."

To this report the defendant filed certain exceptions. After hearing argument, I am satisfied that the report of the referee is correct in every particular, and the exceptions are hereby overruled. The defendant certainly made definite assurances in those circulars, and a definite promise as to the maturity of stock; that if the plaintiff would pay the entrance fees, and his monthly dues for seventy-eight months, that at the end of that time it would pay to him one hundred dollars for each share of stock taken by him. These assurances and this promise were made for the purpose of procuring the plaintiff as a stockholder. This promise was definite. The plaintiff relied upon it, and made the payment of his entrance fees, and his monthly dues. The association knew that the plaintiff was relying upon its promise, and allowed him to make all these payments and to incur the liability of a stockholder. It received the full benefit of this transaction, and it cannot now be heard to say that the con-

tract was contrary to its by-laws, or its charter. Even if this contract were in excess of its charter powers, the association would, nevertheless, be bound by it, inasmuch as it received the full benefit thereof.

In the cases of Williamson *v.* Eastern Building and Loan Association, and Wheeling & Bonnoitt *v.* Eastern Building and Loan Association, these same questions were raised. The supreme court had before it the same circulars, the same certificate, the same by-laws, and the same matters of law, as were introduced in evidence in this case, and its judgment was that the defendant association was bound to the full extent of its promise. These cases conclude all the issues here, and render unnecessary a further discussion of the principles involved.

96 This is a law case, and it will be necessary to have judgment entered regularly upon this order.

It is, therefore, ordered and adjudged that the plaintiff, David W. Ebaugh, do recover of the defendant, Eastern Building and Loan Association of Syracuse, New York, the sum of one thousand dollars, with interest from October 15, 1898, at the rate of seven per cent. per annum, now amounting to one thousand and eighty dollars, together with costs of this action, and that the plaintiff be, and he is hereby, permitted to enter judgment for said sum and costs.

ERNEST GARY,
Judge Fifth Circuit.

Columbia, S. C., January 24th, 1900.

Written notice of intention to appeal duly given.

Exceptions.

1. His honor erred in not deciding that the contract must be governed and construed by the laws of the State of New York, when the question was raised by the pleadings.

2. That his honor erred in not deciding the contract in question was to be sought for in the laws of New York, the defendant's articles of incorporation, by-laws, the certificate, its terms and conditions, and the application for membership, when the question was raised by the pleadings.

3. That his honor erred in not giving full faith and credit to the laws of the State of New York, under art. 4, sec. 1, of the Constitution of the United States, and sec. 905 of the Revised Statutes of the United States.

4. That his honor erred in holding that the defendant was liable on the certificate as an unconditional promise to pay the maturity value of $100.00 per share at the expiration of seventy-eight months,
97 & 98 regardless of the earnings of the defendant association, thereby failing to give full faith and credit to the laws of the State of New York, under art. 4, sec. 1, of the United States Constitution, and sec. 905 of the Revised Statutes of the United States.

5. That his honor erred in holding that a corporation chartered under chapters 122 and 564 of the Laws of New York, which issued a certificate containing a fixed period of maturity, would not be

heard on the plea of *ultra vires*, and would be bound thereby, thereby failing to give full faith and credit to the laws of New York, under art. 4, sec. 1, of the Constitution of the United States, and sec. 905 of the Revised Statutes of the United States.

6. That his honor erred in holding that the certificate of stock and literature issued by the defendant represented that the defendant promised unconditionally to pay the plaintiff $100.00 for each share of stock at the expiration of seventy-eight months. It being submitted that what was said relative to the maturity of stock in that time was merely an expression of opinion as to the time it would take the earnings of the defendant to bring the stock up to the par value of one hundred dollars, and on which no legal reliance could be placed.

7. That his honor erred in holding that the defendant was estopped by reasons of misrepresentations, and then giving judgment to plaintiff on the contract for the full amount claimed, which I respectfully submit is to the plaintiff's advantage.

We hereby agree that the foregoing shall constitute the case for the supreme court on appeal in the above-stated action, and also the return required by law.

T. H. SPAIN,
Appellant's Attorney.

99 THE STATE OF SOUTH CAROLINA:

Supreme Court.

DAVID W. EBAUGH, Plaintiff, Respondent,
vs.
EASTERN B. & L. ASS'N, &c., Defendant, Appellant. } 4566.

Affirmed.
Opinion—Eugene B. Gary, A. J.

We concur.

HENRY McIVER, *C. J.*
Y. J. POPE, *A. J.*
IRA B. JONES, *A. J.*

(*Report.*)

Supreme court of South Carolina, clerk's office, Columbia, S. C.

Filed 28 June, 1900.

U. R. BROOKS, *Clerk.*

THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

DAVID W. EBAUGH, Plaintiff, Respondent,
against
EASTERN BUILDING & LOAN ASSOCIATION OF SYRACUSE, N. Y., Defendant, Appellant.

Opinion.

EUGENE B. GARY, *A. J.:*

The facts of this case are fully set forth in the report of the master and the decree of the circuit judge, which will be incorporated in the report of the case.

100 Contracts similar to that which gave rise to the action herein have recently been construed by this court, in the cases of Williamson *v.* Eastern B. & L. Ass'n, 54 S. C., 582, and Welling *v.* Eastern B. & L. Ass'n, 56 S. C., 280. See, also, cases cited in the notes to Williamson *v.* Eastern B. & L. Ass'n, reported in 71 Am. St. Rep., 822.

The appellant contends that the contract must be construed with reference to the laws of New York, and attempts to differentiate this case from those just mentioned on the ground that the answer alleges, and the testimony establishes the fact, that under the laws of the State, the by-laws of the association and not its express agreement must prevail in the interpretation of the contract between the parties.

Both the master and circuit judge found as matter of fact that the laws of New York did not forbid the defendant from entering into an agreement by which the shares of stock would mature in a definite time.

In his report the master says:

"The question as to whether this promise was in excess of the charter powers, was not expressly decided by the supreme court, but that court did decide that even though it were in excess of its charter powers (in the language of B. B. R. R. Co. *v.* McDonald, 60 Am. St. Rep., 172): 'The general rule is that where a private corporation has entered into a contract not immoral in itself, and not forbidden by any statute, and it has been in good faith performed by the other party, the corporation will not be heard on a plea of *ultra vires.*'

"This proposition is fully sustained by the decisions of New York. The plaintiff introduced in evidence the following decisions of that court:

"Whitney Arms Co. *v.* Barlow, 63 N. Y., 62.

"De Grand *v.* American Linen Thread Co., 21 N. Y., 124.

"Diamond Match Co. *v.* Roeber, 106 N. Y., 473.

"This constituted the only evidence before me as to what
101 was the law of New York touching this point. I find as a matter of fact that the law of New York is that where a cor-

poration enters into a contract, that is in excess of its charter powers or is unauthorized by law, it will nevertheless be bound to perform its agreement as contained in the contract, if it suffers the other party to perform his agreement, and receives the benefits and retains them.

"This being the law of New York, it is conclusive of the case at issue."

The report of the master was confirmed in all respects by the circuit judge.

As this is an action at law, the foregoing findings of fact are not subject to review, but are conclusive on this court.

As the laws of New York are not in conflict with the construction which this court has placed upon contracts similar to that upon which the action herein is founded, we fail to discover any facts, causing us to differentiate this case from those hereinbefore mentioned.

It is the judgment of this court, that the judgment of the circuit court be affirmed.

STATE OF SOUTH CAROLINA,
Greenville County.

In the Supreme Court.

DAVID W. EBAUGH, Plaintiff, Respondent,
against
EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y., Defendants, Appellants.

Appeal from circuit court.

Haynsworth, Parker & Patterson, attorneys for respondent.
T. H. Spain, attorney for appellant.

It is the judgment of this court that the judgment of the circuit court be affirmed.

By the court:

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

102 I, U. R. Brooks, clerk of the supreme court of South Carolina, do hereby certify that the foregoing are true, full, and correct copies of the "case," judgment, and opinion rendered by the court in the case of David W. Ebaugh, plaintiff, respondent, against Eastern Building and Loan Association of Syracuse, N. Y., defendant, appellant; all of which are now on file in my office.

Given under my hand and the seal of the court, at Columbia, this 28th day of August, in the year of our Lord one thousand nine hundred, and the 125th year of the Independence of the United States of America.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

103 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Eastern Building and Loan Association of Syracuse, N. Y., appellant, and David W. Ebaugh, respondent, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein
104 was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of October, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
MELVILLE W. FULLER,
Chief Justice of the United States.

[Endorsed:] Supreme court of South Carolina. Clerk's office, Columbia, S. C. Filed 5 Oct., 1900. U. R. Brooks, clerk.

105 UNITED STATES OF AMERICA, *ss:*

To David W. Ebaugh, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein Eastern Building and Loan Association of Syracuse, N. Y., is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this first day of October, in the year of our Lord one thousand nine hundred.

MELVILLE W. FULLER,
Chief Justice of the United States.

106 On this 10th day of October, in the year of our Lord one thousand nine hundred, personally appeared Jos. A. McCullough before me, the subscriber, and makes oath that he delivered a true copy of the within citation to D. W. Ebaugh, named herein, on the 6th day of October, 1900.

JOS. A. McCULLOUGH.

Sworn to and subscribed the 10 day of Oct., A. D. 1900.

[Seal of B. A. Morgan, Notary Public, South Carolina.]

B. A. MORGAN,
Not. Pub., S. C.

[Endorsed:] Original. I do hereby acknowledge personal service of the within citation this 6th day of October, 1900. D. W. Ebaugh. Witness: H. J. Haynsworth, J. A. McCullough.

107 In the Supreme Court of the United States, October Term, 1900.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y., Plaintiff in Error (Defendant Below),
against
DAVID W. EBAUGH, Defendant in Error (Plaintiff Below).

Bond.

Know all men by these presents that we, Eastern Building and Loan Association of Syracuse, N. Y., a domestic corporation of the State of New York, as principal, and the United States Fidelity & Guaranty Company, a body corporate of Baltimore, Maryland, as surety, are held and firmly bound unto David W. Ebaugh in the full and just sum of three thousand ($3,000) dollars, to be paid to said David W. Ebaugh or his certain attorneys, executors, adminis-

trators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly by these presents.

Sealed with our seals and dated this 23rd day of August, in the year of our Lord one thousand nine hundred.

Whereas lately, at a session of the supreme court for the State of South Carolina, in a suit pending in the said court between said David W. Ebaugh, plaintiff, respondent, against said Eastern Building and Loan Association of Syracuse, N. Y., defendant, appellant, a final judgment was rendered against the said Eastern
108 Building and Loan Association of Syracuse, N. Y., and the said Eastern Building and Loan Association of Syracuse, N. Y., having obtained the allowance of a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid action, and a citation directed to the said David W. Ebaugh, citing and admonishing him to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Eastern Building and Loan Association of Syracuse, N. Y., shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and effect.

EASTERN BUILDING & LOAN ASSOCIATION OF SYRACUSE, N. Y.,
[SEAL.] By D. A. PIERCE, *Vice-President.*

Attest: N. C. VISSCHER,
Ass't Secretary.

THE UNITED STATES FIDELITY & GUARANTY CO. OF BALTIMORE, MD.,
[SEAL.] By GEO. F. M. KEOUGH, *Attorney-in-fact.*

STATE OF NEW YORK, } *ss:*
County of Onondaga, City of Syracuse, }

On this 23rd day of August, before me, a notary public in and for the aforesaid county, personally appeared D. A. Pierce, to me known and known to me to be the individual described in and who executed the foregoing instrument on the part of the Eastern Building and Loan Association, who, being by me duly sworn, deposed and said that he resided in Syracuse, N. Y.; that he is the vice-president of the corporation described in and which executed the above instrument; that he knew the seal of said corporation, and
109 that the seal affixed to said instrument was such corporate seal, and that it was so affixed by the order of the board of directors of said corporation, and that he signed his name thereto by like order.

HARRY J. HAMLIN,
Notary Public. [SEAL.]

STATE OF NEW YORK, } ss:
County of Onondaga, City of Syracuse, }

On this 22nd day of August, before me, a notary public in and for the aforesaid county, personally appeared Geo. F. McKeough, to me known and known to me to be the individual described in and who executed the foregoing instrument on the part of the United States Fidelity and Guarantee Company, who, being by me duly sworn, deposed and said that he resided in Syracuse, N. Y.; that he is the att'y-in-fact of the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal, and that it was affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

THOMAS O'DONNELL,
[SEAL.] *Notary Public.*

CITY OF SYRACUSE, } ss:
County of Onondaga, State of New York, }

On this 22nd day of August, 1900, before me personally appeared Geo. F. McKeough, attorney-in-fact of the United States Fidelity and Guaranty Company, a corporation created and existing under and by virtue of the laws of the State of Maryland and duly authorized to transact business in the State of New York, with whom I
110 am personally acquainted, who, being by me duly sworn, said that he resided in the city of Syracuse, N. Y.; that he is the attorney-in-fact of the United States Fidelity and Guaranty Company; that he knew the corporate seal of said company; that the seal affixed to the annexed instrument is such corporate seal; that it was affixed thereto by order of the board of directors of said company, and that he signed said instrument as attorney-in-fact of said company by like authority, and the said Thos. O'Donnell further said that he is acquainted with Geo. F. McKeough, and knew him to be the attorney-in-fact of said company, and that the signature of the said Geo. F. McKeough, subscribed to the said instrument, is the genuine handwriting of the said Geo. F. McKeough, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Thos. O'Donnell.

THOMAS O'DONNELL,
[SEAL.] *Notary Public.*

At a meeting of the board of directors of the United States Fidelity and Guaranty Company, held at the office of the company in the city of Baltimore, State of Maryland, on the 19th day of January, A. D. 1899, at which was present a quorum of said directors, duly authorized to act in the premises, on motion it was unanimously—

Resolved, That in pursuance of section 811 of the Code of Civil Procedure of the State of New York, James K. McGuire, Geo. F. McKeough, and Thomas Hogan, the attorneys-in-fact of the United States Fidelity and Guaranty Company for the county of Onondaga, in the State of New York, be, and each of them is hereby, authorized

and empowered to sign, execute, and deliver any and all bonds or undertakings for and on behalf of this company, and to attach thereto the seal of the company, the same to be attested by
111 either one of the said attorneys-in-fact above named as occasion may require.

CITY OF BALTIMORE,
County of ——, *State of Maryland,* } *ss:*

I, Richard D. Lang, ass't secretary of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at Baltimore, Md., this 20th day of August, 1900.

RICH'D D. LANG,
Ass't Secretary.

Oct. 1, 1900.

Approved.
MELVILLE W. FULLER,
Chief Justice of the United States.

Statement of the United States Fidelity and Guaranty Company Rendered to the Department of Justice, Washington, D. C., at the Close of Business June 30th, 1900.

Commenced business August 1, 1896.

Assets.

Investments, stocks, and bonds (market value)	$1,037,486.13	
Collateral loans	643,025.00	
Real estate	140,232.07	
Cash on hand and in banks	121,105.64	
112 Mortgages and other collateral taken account salvage	72,349.30	
Agent's balances, less commissions	199,327.82	
Due for subscriptions to department guaranteed attorneys	19,382.23	
Interest due and accrued	16,740.62	
		$2,249,648.81

Liabilities.

Capital stock paid in cash	$1,500,000.00	
Cash deposited for security of risks written	51,081.67	
Surplus and reinsurance reserve	698,567.14	
		2,249,648.81

JOHN R. BLAND, *President.*

GEORGE R. CALLIS, *Secretary.*

STATE OF MARYLAND, }
City of Baltimore, } *ss:*

On this fifth day of July, 1900, before me, A. D. Patrick, a notary public in and for the city and State aforesaid, appeared John R. Bland and George R. Callis, president and secretary respectively of the United States Fidelity and Guaranty Company, who being by me severally duly sworn, did depose and say that they are such officers of the said company, and that the above and foregoing is a full, true, and correct statement of the assets and liabilities of the said company as they appeared upon the books of the said company on the 30th day of June, A. D. 1900.

In witness whereof I have hereunto set my hand and official seal the day and year aforesaid.

A. D. PATRICK,
Notary Public.

[NOTARIAL SEAL.]

113 In the Supreme Court of the United States, October Term, 1900.

EASTERN BUILDING & LOAN ASSOCIATION OF SYRACUSE, N. Y., Appellant (Defendant Below),
against
DAVID W. EBAUGH, Respondent (Plaintiff Below).

Assignment of Errors.

Wherefore comes now Eastern Building and Loan Association of Syracuse, N. Y., plaintiff in error, by its counsel, and respectfully represents that it feels itself aggrieved by the proceedings and judgment of the supreme court of South Carolina in the above-entitled cause and assigns error thereto as follows:

1. The supreme court of South Carolina erred in refusing to give full faith and credit to the public acts, records and judicial decisions of the State of New York, plead and given in evidence by
114 the plaintiff in error, and in denying the rule of constitutional obligation established by section 1 of article IV of the Constitution of the United States and section 905 of the Revised Statutes of the United States.

2. The supreme court of South Carolina erred in its construction of the contract obligation between plaintiff in error and defendant in error in placing the same construction upon the contract in the above-entitled case that was placed by said court upon the contracts in the cases cited in the opinion of the honorable court, and thereby impaired the obligations of a contract between the parties, refused to give full faith and credit to the public acts, records and judicial proceedings of the State of New York and deprived defendant of its property without due process of law.

3. The supreme court of South Carolina erred in adopting from the report of the master in the above-entitled case, as a part of its opinion therein, the following: "The plaintiff introduced in evidence the following decisions of that court: Whitney Arms Co. *v.* Barlow,

63 N. Y., 62; De Grand *v.* American Linen Co., 21 N. Y., 124; Diamond Match Co. *v.* Roeber, 106 N. Y., 473. This constituted the only evidence before me as to what was the law of New York touching this point. I find as a matter of fact that the law of New York is that where a corporation enters into a contract *that is in excess of* its charter powers, or is authorized by law, it will nevertheless be bound to perform its agreement as contained in the contract if it suffers the other party to perform his agreement and receives the benefits and retains them. This being the law of New York, it is conclusive of the case at issue." Whereas, defendant also placed in evidence certain other cases—under agreement that the New York reports should be referred to and the decisions considered
115 part of the case—and which cases and decisions placed in evidence by defendant, as shown by the record herein, clearly show that the aforesaid laws and decisions of New York as cited by the honorable court are not applicable to building and loan associations such as the defendant, your petitioner (printed case, p. 23, fol. 89).

4. The supreme court of South Carolina erred in refusing to give "full faith and credit" to the public acts, records and judicial proceedings of the State of New York and to the contract entered into between plaintiff in error and defendant in error in the State of New York and under and pursuant to the laws thereof, and by its decision, opinion and judgment in said case the supreme court of South Carolina, in contravention of the Constitution of the United States, impairs the obligation of the contract between the plaintiff in error and the defendant in error, and the said decision, opinion and judgment of the supreme court of South Carolina are erroneous in this, that they uphold a rule of law established by the supreme court of South Carolina impairing the obligation of contracts and depriving plaintiff in error of its property without due process of law.

5. The supreme court of South Carolina erred in holding and deciding that "as the laws of New York are not in conflict with the construction which this court has placed upon contracts similar to that upon which the action herein is founded, we fail to discover any facts causing us to differentiate this case from those hereinbefore mentioned."

6. The supreme court of South Carolina erred in refusing to determine and construe the rights of defendant in error as a stockholder in and member of plaintiff in error, and the contract relations between said plaintiff in error and defendant in error, under the laws and decisions of the State of New York, under
116 which laws and decisions said rights and contract must necessarily be determined and construed; thereby impairing the obligation of the contract herein and refusing to give full faith and credit to the laws of New York.

7. The supreme court of South Carolina erred in holding that the laws of New York did not forbid the plaintiff in error from entering into an agreement by which its shares of stock would mature in a definite time, thus making its certificates of stock unconditional

promises to pay the maturity value of $100 per share at the expiration of seventy-eight months, regardless of the earnings and expenses of the corporation, thereby failing to give full faith and credit to the laws of New York under article 4, section 1, of the Constitution of the United States and section 905 of the Revised Statutes of the United States.

8. The supreme court of South Carolina erred in holding that plaintiff in error, a corporation of New York, incorporated under chapter 122 of the Laws of 1851 of the State of New York as amended by chapter 564 of the Laws of 1875 of said State, was and is bound by an *ultra vires* agreement embodied in a certificate of stock issued to defendant in error, and cannot be heard to question or deny its liability and obligations under such *ultra vires* agreement, notwithstanding that it has been expressly held and decided by the courts of New York that such an agreement is not binding upon this plaintiff in error and corporations of like character. And the supreme court of South Carolina thereby refused to give full faith and credit to the laws and judicial decisions of the State of New York in violation of article 4, section 1 of the Constitution of the United States, and section 905 Revised Statutes of the United States.

9. The supreme court of South Carolina erred in not determining the contract relations between the parties under and in ac-
117 cordance with the articles of incorporation, by-laws, stock certificate, application for membership, the laws of the State of New York, and the decisions thereunder, when the said articles, by-laws, stock certificate, application for membership and the laws and the decisions of the State of New York were plead, relied upon and given in evidence by the plaintiff in error, and when the Federal questions involved were saved by exceptions of plaintiff in error (printed case, pp. 96–97, fols. 382–388).

Wherefore, the said Eastern Building and Loan Association, plaintiff in error, prays this honorable court to examine and correct the errors assigned, and for a reversal of the judgment of the supreme court of South Carolina entered in the said case of David W. Ebaugh, plaintiff, respondent, *v.* Eastern Building and Loan Association of Syracuse, N. Y., defendant, appellant, as aforesaid.

EASTERN BUILDING AND LOAN
ASSOCIATION OF SYRACUSE, N. Y.,
Plaintiff in Error.

By WM. HEPBURN RUSSELL,
WM. BEVERLY WINSLOW,
Its Attorneys.

D. A. PIERCE,
RUSSELL & WINSLOW,
Of Counsel.

118 In the Supreme Court of the United States, October Term, 1900.

Supreme Court of South Carolina.

CLERK'S OFFICE, COLUMBIA, S. C.

Filed 5 Oct., 1900.

U. R. BROOKS, *Clerk*.

EASTERN BUILDING AND LOAN ASSOCIATION of Syracuse, N. Y., Plaintiff in Error (Defendant Below),
against
DAVID W. EBAUGH, Defendant in Error (Plaintiff Below).
} Petition for Writ of Error.

In the matter of the petition of the Eastern Building and Loan Association of Syracuse, N. Y., a corporation of New York, for a writ of error directed to the supreme court of the State of South Carolina, for the purpose of bringing to this court by said writ for review the case of—

DAVID W. EBAUGH, Plaintiff, Respondent,
against
EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y., Defendant, Appellant.

Wm. Hepburn Russell, Wm. Beverly Winslow, attorneys for petitioner.

D. A. Pierce, Russell & Winslow, of counsel.

119 In the Supreme Court of the United States, October Term, 1900.

EASTERN BUILDING AND LOAN ASSOCIATION of Syracuse, N. Y., Plaintiff in Error (Defendant Below),
against
DAVID W. EBAUGH, Defendant in Error (Plaintiff Below).
} Petition for Writ of Error.

In the matter of the petition of the Eastern Building and Loan Association of Syracuse, N. Y., a corporation of New York, for a writ of error directed to the supreme court of the State of South Carolina, for the purpose of bringing to this court by said writ for review the case of—

DAVID W. EBAUGH, Plaintiff, Respondent,
against
EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y., Defendant, Appellant.

120 Petition for a writ of error to require the supreme court of the State of South Carolina to certify, send up and transmit to this honorable court, under the provisions of section 709 of the Revised Statutes of the United States, the record in said case and the judgment and opinion of the supreme court of South Carolina therein, in order that certain Federal questions arising upon the face of the record, judgment and opinion therein may be reviewed, re-examined, and finally determined by the Supreme Court of the United States.

To the honorable the Chief Justice of the United States and the associate justices of the Supreme Court of the United States:

Your petitioner, Eastern Building and Loan Association of Syracuse, N. Y., a corporation organized and existing under the laws of the State of New York, and having its domicile and corporate situs in the city of Syracuse, in said State, respectfully shows:

That on the — day of June, 1900, the supreme court of the State of South Carolina rendered a judgment against your petitioner in a certain cause wherein David W. Ebaugh was the plaintiff, respondent and your petitioner was defendant, appellant, and by said judgment affirmed the judgment of the court of common pleas of the State of South Carolina for the county of Greenville, in said State, from which, said case was by your petitioner appealed to said supreme court of South Carolina, and said supreme court of South Carolina, by its judgment in said case and by the order of remittitur to the court below entered therein, affirmed the judgment of the court below against your petitioner for the sum of $1,000, with interest from October 15, 1898, at the rate of 7 per cent. per annum, together with costs, and thereby deprived your petitioner of its property without due process of law, and impaired the obligation of a contract,

121 all of which will appear by reference to the record and proceedings in this cause. Said supreme court of South Caro-

lina is the highest court in said State in which a decision could be had, and said decision and judgment was a final judgment in said case and finally determined the same; and your petitioner avers that by the said opinion and judgment of said supreme court of South Carolina in said case certain errors were committed to the prejudice of the defendant in said case, your petitioner herein, and certain Federal questions appearing upon the face of the record in said case were decided and determined adversely to the defendant, your petitioner, and adversely to the constitutional rights, privileges, and immunities of your petitioner arising under the Constitution of the United States, and claimed and asserted as such by your petitioner in said case; all of which will more in detail appear from the facts hereinafter averred and set forth by way of "cause shown" in support of this petition, and from the assignment of errors annexed hereto. And your petitioner claims the right to remove said judgment and the record in said cause to the Supreme Court of the United States by a writ of error under the statutes of the United States authorizing writs of error to State courts, particularly under § 709 of the Revised Statutes of the United States, because your petitioner, defendant in said case, claimed before the supreme court of South Carolina in said case certain rights, privileges, and immunities granted and secured to your petitioner by the Constitution of the United States; and your petitioner particularly claimed:

1. That a certain contract entered into between the plaintiff in said case and the defendant therein, your petitioner, should be construed under and controlled by the public acts, laws and judicial proceedings of the State of New York, in which State said
122 contract was entered into, and that full faith and credit should be given to the public acts, records and judicial proceedings of the State of New York by the courts of South Carolina, and particularly by the said supreme court, but said court, by its judgment and opinion in said case impaired the obligation of said contract, and refused and failed to give full faith and credit to the laws of the State of New York, as aforesaid, in violation of section 1, art. IV, of the Constitution of the United States and § 905 of the Revised Statutes of the United States.

2. That the supreme court of South Carolina, by its judgment and opinion in said case, deprived your petitioner of divers and sundry other rights, privileges, and immunities claimed by it under the Constitution and laws of the United States, all of which is more fully shown and recited in the causes hereinafter shown in support of this petition, and all of which appears by the record and proceedings in said cause, which are herewith submitted.

Wherefore, your petitioner prays the allowance of a writ of error, returnable into the Supreme Court of the United States, and for citation and supersedeas, and for such other orders and process as may be or become necessary in the premises, and that, upon the giving of a supersedeas bond and the approval thereof, all further proceedings in the supreme court of South Carolina, or under and pursuant to the judgment rendered therein, shall be suspended and stayed

until the determination of said writ of error by the honorable the Supreme Court of the United States.

And your petitioner will ever pray.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y., *Petitioner*,
By WM. HEPBURN RUSSELL,
WM. BEVERLY WINSLOW,
Attorneys for Petitioner.

123 *Cause Shown.*

In support of the foregoing petition, your petitioner, Eastern Building and Loan Association of Syracuse, N. Y., respectfully shows to this honorable court as follows:

I.

That your petitioner is a domestic corporation of the State of New York, duly organized and existing under the laws of said State, with its corporate situs and domicile at Syracuse in said State as aforesaid, and that it has been a corporation as aforesaid ever since the first day of March, 1890 (printed case, p. 5, fol. 19; pp. 44–54, fols. 172–215).

II.

That under the laws of the State of New York and under the charter of incorporation and by-laws of your petitioner, its franchises are such as to make and constitute it a building, mutual loan and accumulating fund association, commonly known as a building and loan association, with all the rights and powers and subject to all the limitations of such corporations organized under the laws of the State of New York and particularly under the provisions of chapter 122 of the Laws of 1851 of the State of New York, and the acts amendatory thereof and supplementary thereto, under and pursuant to which the organization of your petitioner was made and effected (printed case, pp. 44–54, fols. 172–215; pp. 68–92, fols. 271–364).

III.

That your petitioner, as a corporation of the State of New York, long prior to the institution of the suit aforesaid by the plaintiff therein, fully complied with all provisions of the laws of the State of South Carolina necessary to authorize and enable your
124 petitioner as a foreign corporation to do and transact business and to make and enter into contracts and have members and stockholders in the State of South Carolina.

IV.

That long prior to the institution of the action aforesaid in the courts of South Carolina, and on or about the first day of April, 1892, said plaintiff Ebaugh, in the action mentioned in the caption hereof, became a member of, and a stockholder in your petitioner, and subject as such to all the provisions of the charter of incorporation and by-laws of your petitioner and the laws of the State of New

York and the decisions of the courts of the State of New York construing and applying said laws to said charter and by-laws as between your petitioner and its members and stockholders (printed case, pp. 14–17, fols. 55–67; pp. 68–78, fols. 271–309; pp. 79–92, fols. 315–364; pp. 54–60, fols. 215–238; p. 21, fols. 81, 82; pp. 44–54, fols. 172–215).

V.

That during the month of March or April, 1892, the plaintiff aforesaid applied in writing to your petitioner at its home office in Syracuse, New York, for ten shares of the installment capital stock issued by your petitioner, and by the terms of such written application agreed to abide by all the rules and regulations of your petitioner and to abide and be governed by the charter of incorporation and by-laws of your petitioner and by the laws of the State of New York aforesaid (printed case, pp. 13, 14, fols. 51–55).

VI.

That your petitioner accepted said application and issued to said plaintiff at its home office in the city of Syracuse, New York, ten shares of its installment stock of the par or maturity value of
125 $100 per share, and amounting in all to $1,000 par value, represented by certificate No. 12170, duly issued to and accepted by said plaintiff on or about the first day of April, A. D. 1892 (printed case, pp. 13–17, fols. 51–67).

VII.

That said plaintiff paid a membership fee of $1 per share upon said installment stock and monthly installments of seventy-five cents per share by way of dues or calls, for seventy-eight months, which in total amounted to $595, and thereupon demanded from your petitioner the payment to said plaintiff of the full par or maturity value of said stock, to wit, $1,000, which demand not being complied with, said plaintiff began the action aforesaid (printed case, p. 7, fols. 24–26).

VIII.

That your petitioner, by way of defense to said action, expressly plead and relied upon its charter of incorporation, or articles of incorporation under the laws of the State of New York, its by-laws, rules and regulations, the written agreements and contracts of said plaintiff with your petitioner and his obligation to your petitioner by reason of his status as a member of and a stockholder in your petitioner as a corporation of the State of New York; and your petitioner specifically plead and relied upon the laws of the State of New York governing your petitioner and under which it was incorporated, and also certain decisions of the courts of New York constituting a part of the settled law of said State and binding both upon your petitioner and upon said plaintiff as a stockholder in and a member of your petitioner, and the decisions so plead and relied upon by your petitioner were the following, to wit: O'Malley *v.* People's, &c., Association, 92 Hun. (N. Y.), 572; Englehardt *v.* Fifth

Ward, &c., Association, 148 N. Y., 281; also reported in 42 N. E. Rep., 710; People *v.* Lowe, 117 N. Y., 175; Concordia Savings
126 & Aid Asso. *v.* Read, 93 N. Y., 474. (See also printed "case," pp. 54–60, fols. 215–238; p. 21, fols. 81–83.)

IX.

That your petitioner having so plead and relied upon said laws, decisions, articles of association and by-laws and upon the written contracts and agreements of said plaintiff made and entered into in the State of New York and under the laws thereof by said plaintiff with your petitioner, the same were given and admitted in evidence in said action and in nowise denied or controverted by any evidence given in said action on behalf of said plaintiff, but were and are undisputed facts and evidence in said action, appearing as such upon the face of the record therein and wholly documentary in character (printed case, pp. 5–13, fols. 18–50; p. 21, fols. 81–83; pp. 54–60, fols. 215–238; pp. 44–54, fols. 172–215; pp. 68–92, fols. 271–364; pp. 14–18, fols. 55–70).

X.

That the facts in this case were undisputed between the parties in the court below and in the supreme court, and the case upon the facts, practically presented only a question of law arising upon written contracts and documents and the public acts, records, laws and judicial decisions of the State of New York, and no disputed question of fact was submitted to the master for determination in the lower court in South Carolina, but on the contrary, the case turned upon questions of law, and therefore the only question presented to the supreme court of South Carolina for its determination arose out of the contract obligations of said plaintiff to defendant, your petitioner; said contract obligations having been entered into in the State of New York under and pursuant to the laws of said State and being wholly governed thereby.

127 XI.

That the supreme court of South Carolina in its opinion and decision in the case aforesaid finds and concedes that the said plaintiff was a member of and a stockholder in the defendant corporation, Eastern Building and Loan Association of Syracuse, N. Y., and had in fact entered into contractual relations with it in the State of New York under and pursuant to the laws of that State, stating that both the master and the circuit judge found as matter of fact that the laws of New York did not forbid the defendant from entering into an agreement by which the shares of stock would mature in a definite time; and, further, that "the general rule is that where a private corporation has entered into a contract not immoral in itself and not forbidden by any statute, and it has been in good faith performed by the other party, the corporation will not be heard on a plea of *ultra vires*." And that "this proposition is fully sustained by the decisions of New York." Whereas, the decisions placed in evidence by your petitioner distinctly contradict the learned court, by which

holding and decision the supreme court of South Carolina denies to your petitioner the equal protection of the laws and deprives it of its property without due process of law, impairs the obligation of its contract with said plaintiff and refuses to give full faith and credit to the laws of the State of New York as required by the Constitution of the United States (printed case, p. 100, Ex. A).

XII.

That having plead and relied upon the laws, decisions, articles of incorporation, by-laws and contracts with the plaintiff, as aforesaid, your petitioner as a corporation of the State of New York authorized to do business in the State of South Carolina and subject to
128 the jurisdiction of the courts of that State, by reason of its compliance with the laws thereof, claimed and relied upon "the equal protection of the laws" of the State of South Carolina, guaranteed to your petitioner by the Constitution of the United States, and claimed and demanded that "full faith and credit" should be accorded by the courts of South Carolina to the laws and judicial decisions of the State of New York as guaranteed to your petitioner by the Constitution of the United States and claimed and demanded as a matter of intendment by its answer and the evidence given in its behalf, as aforesaid, all the rights, privileges and immunities to which your petitioner was and is entitled under the Constitution of the United States, and particularly claimed and demanded that the relations of said plaintiff Ebaugh and your petitioner Eastern Building and Loan Association of Syracuse, N. Y., should be determined by and under the laws of the State of New York, and that the settled construction of such contract obligation as determined by the courts of New York should be followed by the courts of South Carolina, and especially by the supreme court of said State (printed case, pp. 5–13, fols. 18–50; pp. 44–54, fols. 172–214; pp. 54–60, fols. 215–238; p. 21, fols. 81–83; pp. 68–78, fols. 271–310; pp. 79–92, fols. 314–364; pp. 14–17, fols. 55–66; pp. 40–43, fols. 157–169).

XIII.

That all of the matters and things aforesaid and divers and sundry other matters involving Federal questions, are manifest upon the face of the record in said action, for the removal of which to this court a writ of error is by your petitioner prayed, and your petitioner presents herewith a duly certified printed copy of the "case" on appeal, upon which said action was heard and determined in said supreme court of South Carolina; and your petitioner also presents a duly certified copy of the opinion of the supreme court of
129 South Carolina showing the final decision of said court in said case and the grounds thereof, and marks the same "Exhibit A;" and your petitioner also presents a duly certified copy of the judgment and mandate and all the proceedings taken and orders entered in said action by the supreme court of South Carolina, finally adjudging and determining the issues therein, and marks same

"Exhibit B," and prays that such exhibits be for all purposes treated as a part of this petition in this behalf.

XIV.

That the opinion, decision and judgment of the supreme court of South Carolina rests entirely upon its refusal to give full faith and credit to the public acts, records and judicial proceedings of the State of New York, and to the contract entered into between said plaintiff and defendant thereunder; whereas, the rights of defendant in error, as a member of and a stockholder in plaintiff in error should have been determined by the laws of New York; and that the rights of defendant under said laws of New York were fully saved by exceptions to the rulings of the trial and appellate court (printed case, pp. 40–43, fols. 157–169; pp. 96, 97, fols. 382–387; Exhibit A).

Assignment of Errors.

Wherefore, comes now Eastern Building and Loan Association of Syracuse, N. Y., plaintiff in error, by its counsel, and respectfully represents that it feels itself aggrieved by the proceedings and judgment of the supreme court of South Carolina in the above-entitled cause and assigns error thereto as follows:

1. The supreme court of South Carolina erred in refusing to give full faith and credit to the public acts, records and judicial decisions of the State of New York, plead and given in evidence by the
130 plaintiff in error, and in denying the rule of constitutional obligation established by section 1 of article IV of the Constitution of the United States and section 905 of the Revised Statutes of the United States.

2. The supreme court of South Carolina erred in its construction of the contract obligation between plaintiff in error and defendant in error in placing the same construction upon the contract in the above-entitled case that was placed by said court upon the contracts in the cases cited in the opinion of the honorable court, and thereby impaired the obligations of a contract between the parties, refused to give full faith and credit to the public acts, records and judicial proceedings of the State of New York and deprived defendant of its property without due process of law.

3. The supreme court of South Carolina erred in adopting from the report of the master in the above-entitled case, as a part of its opinion therein, the following: "The plaintiff introduced in evidence the following decisions of that court: Whitney Arms Co. *v.* Barlow, 63 N. Y., 62; De Grand *v.* American Linen Co., 21 N. Y., 124; Diamond Match Co. *v.* Roeber, 106 N. Y., 473. This constituted the only evidence before me as to what was the law of New York touching this point. I find as a matter of fact that the law of New York is, that where a corporation enters into a contract that is in excess of its charter powers, or is authorized by law, it will nevertheless be bound to perform its agreement as contained in the contract if it suffers the other party to perform his agreement and receives the benefits and retains them. This being the law of New

York, it is conclusive of the case at issue." Whereas, defendant also placed in evidence certain other cases—under agreement that the New York reports should be referred to and the decisions
131 considered part of the case—and which cases and decisions placed in evidence by defendant, as shown by the record herein, clearly show that the aforesaid laws and decisions of New York as cited by the honorable court are not applicable to building and loan associations such as the defendant, your petitioner (printed case, p. 23, fol. 89).

4. The supreme court of South Carolina erred in refusing to give "full faith and credit" to the public acts, records and judicial proceedings of the State of New York and to the contract entered into between plaintiff in error and defendant in error in the State of New York and under and pursuant to the laws thereof, and by its decision, opinion and judgment in said case the supreme court of South Carolina, in contravention of the Constitution of the United States, impairs the obligation of the contract between the plaintiff in error and the defendant in error, and the said decision, opinion and judgment of the supreme court of South Carolina are erroneous in this, that they uphold a rule of law established by the supreme court of South Carolina impairing the obligation of contracts and depriving plaintiff in error of its property without due process of law.

5. The supreme court of South Carolina erred in holding and deciding that "as the laws of New York are not in conflict with the construction which this court has placed upon contracts similar to that upon which the action herein is founded, we fail to discover any facts causing us to differentiate this case from those hereinbefore mentioned."

6. The supreme court of South Carolina erred in refusing to determine and construe the rights of defendant in error as a stockholder in and member of plaintiff in error, and the contract relations between said plaintiff in error and defendant in error, under the laws and decisions of the State of New York, under which
132 laws and decisions said rights and contract must necessarily be determined and construed; thereby impairing the obligation of the contract herein and refusing to give full faith and credit to the laws of New York.

7. The supreme court of South Carolina erred in holding that the laws of New York did not forbid the plaintiff in error from entering into an agreement by which its shares of stock would mature in a definite time, thus making its certificates of stock unconditional promises to pay the maturity value of $100 per share at the expiration of seventy-eight months, regardless of the earnings and expenses of the corporation, thereby failing to give full faith and credit to the laws of New York under article 4, section 1, of the Constitution of the United States and section 905 of the Revised Statutes of the United States.

8. The supreme court of South Carolina erred in holding that plaintiff in error, a corporation of New York, incorporated under chapter 122 of the Laws of 1851 of the State of New York as

amended by chapter 564 of the Laws of 1875 of said State, was and is bound by an *ultra vires* agreement embodied in a certificate of stock issued to defendant in error, and cannot be heard to question or deny its liability and obligations under such *ultra vires* agreement, notwithstanding that it has been expressly held and decided by the courts of New York that such an agreement is not binding upon this plaintiff in error and corporations of like character. And the supreme court of South Carolina thereby refused to give full faith and credit to the laws and judicial decisions of the State of New York in violation of article 4, section 1 of the Constitution of the United States, and section 905, Revised Statutes of the United States.

9. The supreme court of South Carolina erred in not determining the contract relations between the parties under and in accordance
133 with the articles of incorporation, by-laws, stock certificate, application for membership, the laws of the State of New York, and the decisions thereunder, when the said articles, by-laws, stock certificate, application for membership and the laws and the decisions of the State of New York were plead, relied upon and given in evidence by the plaintiff in error, and when the Federal questions involved were saved by exceptions of plaintiff in error (printed case, pp. 96, 97, fols. 382–388).

Wherefore, the said Eastern Building and Loan Association, plaintiff in error, prays this honorable court to examine and correct the errors assigned, and for a reversal of the judgment of the supreme court of South Carolina entered in the said case of David W. Ebaugh, plaintiff, respondent, *v.* Eastern Building and Loan Association of Syracuse, N. Y., defendant, appellant, as aforesaid.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y.,
Plaintiff in Error,

By WM. HEPBURN RUSSELL,
WM. BEVERLY WINSLOW, *Its Attorneys.*

D. A. PIERCE,
RUSSELL & WINSLOW, *Of Counsel.*

134 OCT. 1ST, 1900.

Let the writ of error issue as prayed, & operate as a supersedeas on plaintiff in error filing bond in the penal sum of three thousand dollars, conditioned according to law and approved by the undersigned.

MELVILLE W. FULLER,
Chief Justice of the United States.

Supreme court of South Carolina. Clerk's office, Columbia, S. C. Filed 5 Oct., 1900. U. R. Brooks, clerk.

Endorsed on cover: File No., 17938. South Carolina supreme court. Term No., 453. Eastern Building and Loan Association of Syracuse, New York, plaintiff in error, *vs.* David W. Ebaugh. Filed October 22nd, 1900.

Supreme Court of the United States. 1

OCTOBER TERM, 1900.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y., Plaintiff in Error, vs. DAVID W. EBAUGH, Defendant in Error.	Term No. 453. In Error to the Supreme Court of the State of South Carolina 2

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Preliminary.

Defendant in error moves for a dismissal of the writ of error in this case upon the ground that no federal question is involved. Coupled with the motion to dismiss is a motion to affirm upon the ground 3
that even if a federal question does exist, thereby conferring jurisdiction upon this Court, it is "frivlous," the contention being made that the writ of error herein was sued out "for delay only."

The motion to dismiss or affirm, as served upon counsel for plaintiff in error, is not sustained by affi-

4 davit or verification, so far as the "abstract of the case" in connection therewith is concerned, nor does such "abstract of the case" embody "so much of the record as will enable the Court to act understandingly without reference to the transcript." The motion and "abstract" are, therefore, insufficient and the motion should be denied, because this Court cannot be required to search through the transcript in a case in order to find grounds on which to support a motion to dismiss or affirm.

Callan *v.* Bransford, 139 U. S., 197, 198.
Carey *v.* Houston, &c., Ry Co., 150 U. S., 170–179.

5 We repel the suggestion of the motion that the writ of error in this case was sued out merely for purposes of delay. Counsel for defendant in error well know, and will doubtless admit, that we have recently requested them to stipulate that this case might be advanced for hearing in connection with the case of *Eastern Building and Loan Association* v. *Welling and Bonnoitt*, No. 190 upon the calendar of the present term of this court, and which also comes to this court upon writ of error to the Supreme Court of South Carolina, and involves questions almost identical with those arising in this case. Counsel will also doubtless admit that they declined to accede to this request. This shows whether
6 plaintiff in error seeks delay or not.

Again, the transcript shows that the judgment in the trial court in South Carolina was rendered January 24, 1900 (Transcript, p. 65); that an appeal to the Supreme Court of South Carolina was immediately taken (Transcript, pp. 65, 66); that the case was heard in the Supreme Court of South Carolina and the judgment affirmed on June 28, 1900 (Transcript, p. 66); that on August 28, 1900, a certified copy of the record in the State Supreme Court was obtained from the Clerk of that court (Transcript, p. 68); and that at the earliest practicable date thereafter MR. CHIEF JUSTICE FULLER had such record submitted to him upon the ground that the case in-

volved a federal question, and he allowed the writ 7
of error on October 1, 1900 (Transcript, p. 69); the completed transcript was then filed in this court on October 22, 1900 (Transcript, p. 86).

We submit that few cases have ever been brought to this court by writ of error to a State court more expeditiously, and we seek only to have this case heard and determined upon its merits, after full argument, at the earliest date when it can be reached.

Statement of the Case.

We cannot accept the "abstract of the case" in support of the motion to dismiss or affirm as a correct "history of this case," and, on the contrary, we 8
regret to say that it wholly fails to present to this Court the facts shown by the record, from a consideration of which the existence or non-existence of a "federal question" must be determined.

The facts of the case, as we find them in the record, are as follows:

I.—Plaintiff in error (defendant below) is a corporation organized under the laws of the State of New York, with its principal place of business in Syracuse, New York.

Transcript, p. 2.

II.—It was incorporated under Chapter 122 of the Laws of New York of 1851, as amended by Chapter 9
564 of the Laws of New York of 1875, and both of these laws were given in evidence, and appear in the record in this case.

Transcript, pp. 31–38.

III.—The corporate charter or articles of incorporation were given in evidence, and appear in the record.

Transcript, pp. 47–53.

IV.—The by-laws of the corporation were also given in evidence, and appear in the record.

Transcript, pp. 54–62.

10 V.—The case of *O'Malley* v. *People's Building & Loan Association*, reported in 92 Hun (N. Y.), 572, was also formally given in evidence in behalf of the corporation.

Transcript, pp. 38-41.

VI.—D. A. Pierce, a witness called in behalf of the corporation, qualified himself as an expert to testify to the laws of the State of New York, showed his special familiarity with the laws of that State applicable to building and loan associations, specifically testified that the Laws of 1851 and 1875, aforesaid, were the governing acts under which plaintiff in-error was incorporated, and then testifies
11 that "under the statute under which defendant corporation is incorporated and the defendant's articles of incorporation and by-laws and the decisions of the courts of the State of New York, the defendant is not bound to mature its stock within the time specified, if any, on the face of the certificates, say 78 months or any other fixed period, regardless of the actual value of said stock at the expiration of said fixed period, said value depending, of course, upon the payment of dues made thereon and their *pro rata* share of the earnings; that any period of maturity fixed or indicated in the certificates of stock in any way is simply an estimated period, and that the association is not required to pay the face
12 value thereof at the expiration of any such period, unless the amount paid in thereon together with the earnings apportioned thereto shall equal the par value of the shares."

Transcript, pp. 41, 42.

VII.—It was also agreed upon the trial "that the New York Reports can be referred to and the decisions shall be considered parts of the case."

Transcript, p. 16.

VIII.—Under this stipulation, counsel for the corporation gave in evidence the cases of *Englehardt*

v. *Fifth Ward Dime Savings Assn.*, reported 148 N. Y., 281; *People* v. *Lowe*, reported 117 N. Y., 175; *Concordia Savings, &c, Assn.* v. *Read*, reported 93 N. Y., 474; and thereupon defendant in error (plaintiff below) introduced under said agreement of counsel the cases of *Whitney* v. *Barlow*, reported 63 N. Y., 62; *De Graff* v. *American Linen Thread Co.*, reported 21 N. Y., 124; and *Diamond Match Co.* v. *Roeber*, reported 106 N. Y., 473. 13

IX.—Upon the trial "the Referee was requested by defendant's attorney to give full faith and credit to the laws of New York under Article IV., § 1 of the United States Constitution and under § 905 of the Revised Statutes of the United States." 14

Transcript, p. 16.

X.—The case was heard in the trial Court before a referee. The report of the Referee was against the corporation (Transcript, pp. 24–28) and the Referee in his findings expressly refused to be bound by and give effect to the statutes and judicial decisions of the State of New York, in accordance with the terms of those statutes and the meaning and effect of those decisions in the State of New York.

Transcript, pp. 26, 27, 28.

The report of the Referee was excepted to by counsel for the corporation upon numerous grounds, among others, "That the Referee erred in not giving full faith and credit to the laws of New York, under Article IV., § 1 of the Constitution of the United States and under § 905 of the Revised Statutes of the United States." 15

Transcript, pp 29, 30, Finding XII.

The report of the Referee was confirmed and judgment rendered thereon in the Court of Common Pleas for the County of Greenville, the exceptions to the Referee's report being overruled and judg-

16 ment rendered against the plaintiff in error, the judge of that Court holding that the decisions of the Supreme Court of South Carolina in the cases of *Williamson* v. *Eastern Building and Loan Association* and *Welling and Bennoitt* v. *Eastern Building and Loan Association*, previously decided by the Supreme Court of South Carolina, were controlling upon the questions involved.

Transcript, pp. 62-65.

XII.—Exceptions to the decision and judgment of the Court of Common Pleas were duly taken, and what seem to be several distinct "federal questions" were raised by these exceptions.

17 Transcript, p. 65; Exceptions, 1, 2, 3, 4, 5.

XIII.—Upon these exceptions on appeal the case was heard and determined in the Supreme Court of South Carolina and the judgment of the lower Court "affirmed."

Transcript, pp. 66, 68.

XIV.—In the case of *Welling and Bennoitt* v. *Eastern Building and Loan Association*, 56 S. C., 280, the Supreme Court of South Carolina, in its opinion in that case, laid down the following proposition of law: "The appellant, however, contends that the
18 said agreement and the by-laws are to be construed under the laws of New York. * * * This is not a right of either State, but is permitted and accepted by the States for mutual interest and convenience, from a sense of the inconvenience which would otherwise result, and from a moral necessity to do justice in order that justice may be done in return. Without this rule the law of one State can have no force in another. But there is no comity among the Courts of the different States. * * * It is the duty of every State to look to the interests of its own subjects. Comity being voluntary and not obligatory, cannot supersede all discretion on the

subject. * * * No State can demand the 19
recognition of its laws in another, if they are deemed by the latter to be impolitic or unjust, of bad morals, or injurious to the rights of its citizens, or against its public policy. * * * It thus appears that the State is not compelled from mere comity to recognize the laws of New York for the reasons stated. The agreement herein is, in our opinion, injurious to the interests of our people, *and whatever may be the laws of New York, we do not think they should be enforced in this State.*"

56 S. C., 280, 296 297.

XV.—In the case at bar, the Supreme Court of South Carolina, following the reasoning in the *Wel-* 20
ling and Bonnoitt case, and citing that case as a controlling precedent, affirmed the judgment of the lower court, but, the *Welling and Bonnoitt* case having in the meantime been brought by writ of error to this court, the transcript in that case having been filed in the office of the Clerk of this court on January 27, 1900 (Transcript of Record in case of Welling and Bonnoitt, No. 17,620, Term No. 190, p. 117), the Supreme Court of South Carolina, in its opinion in the case at bar, while following literally the doctrine laid down in the *Welling and Bonnoitt* case, yet seeks to make it appear that its opinion and decision is in conformity with the laws and decisions of the State of New York, and that it has 21
construed the charter powers, duties and obligations of plaintiff in error and the contract of membership between plaintiff in error and defendant in error in accordance with the laws of New York. Says the Supreme Court of South Carolina in its opinion: "Both the Master and Circuit Judge find, as *matter of fact*, that the laws of New York do not forbid the defendant from entering into an agreement by which his shares of stock would mature in a definite time."

Transcript, p. 67.

22 It is then sought to rest the decision in this case solely upon the proposition that plaintiff in error could not escape liability to defendant in error upon the ground that it had entered into a contract or agreement "in excess of its charter powers or * * * unauthorized by law" (Transcript, pp. 67, 68), thus ignoring the fact that *this is not the question presented by the record in this case at all* and is a mere side issue imported into the case for the purpose of trying to avoid construing the membership obligations of defendant in error *as a stockholder* in plaintiff in error under and in accordance with the corporate charter and by-laws and the laws and judicial decisions of the State of New York.

23 Closing its opinion in this case, the Supreme Court of South Carolina says: "As the laws of New York are not in conflict with the construction which this Court has placed upon contracts similar to that upon which the action herein is founded, we fail to discover any facts causing us to differentiate this case from those hereinbefore mentioned."

Transcript, p. 68.

XVI.—The first "federal question" presented in this case is whether defendant in error as a stockholder in plaintiff in error was entitled, in an action brought by him, as a stockholder, to recover from plaintiff in error the amount of his contributions to

24 the capital stock of plaintiff in error, to have his rights and claims adjudicated and determined under the laws of South Carolina without regard to the articles of incorporation and by-laws, and statutes and decisions of the State of New York, or whether plaintiff in error was entitled, upon the trial of such action, to have full faith and credit accorded by the Courts of South Carolina to the statutes and judicial decisions of the State of New York, *with the right to have the same effect given to the statutes of New York and the articles of incorporation and by-laws of the plaintiff in error that had been and would be given to such*

laws, articles of incorporation and by-laws in the 25
State of New York by the courts of New York.
The denial of this right to plaintiff in error is manifest upon the face of the record in this case, as the following further statement will show.

XVII.—Defendant in error, as plaintiff below, brought his action upon a stock certificate of the Eastern Building and Loan Association, alleging himself to be a shareholder, and that for a period of 78 months he had made payments of dues or calls upon his stock to the association. He further alleged that under his contract of membership he was entitled, after the payment of 78 monthly installments of seventy-five cents each upon each share of 26
the stock subscribed for by him, to have such stock redeemed by the association at its full par or maturity value of $100 per share. He alleged the making of the stated number of payments and the failure of the association to pay him the par or maturity value of his stock. He did not allege that the stock had been fully paid or was matured.

Transcript, pp. 2-4.

XVIII.—Plaintiff in error (defendant below) answered, admitting that plaintiff below was a stockholder, but pleading specifically that his stock had not attained its par or maturity value, was not fully paid, and that under its articles of incorpora- 27
tion and by-laws and the laws of the State of New York it had no right, power or authority to make payment to the said plaintiff of the par value of his said stock or to pay to him anything more "than the sum paid in by him on said stock, plus the accumulated profits thereon less the *pro rata* share of expenses and losses of defendant corporation properly chargeable against said stock pursuant to its articles of incorporation and its by-laws, not inconsistent with said articles and said laws of the State of New York."

It was further alleged in the answer, "That any

provision in the certificate of stock issued by the defendant corporation to the plaintiff that the shares of stock held by him purporting or pretending to guarantee the maturity value thereof at any fixed time or period, without regard to the earnings and profits of the defendant corporation and the equal *pro rata* distribution of profits, losses and expenses of the defendant corporation among its stockholders is a contract or attempted contract *ultra vires* of the corporation, wholly beyond its corporate powers, in contravention of its articles of incorporation, by-laws and the laws of the State of New York by which it is governed, and unenforcible against it, *but that there is any such guaranty or agreement to pay is denied, and on the contrary it is alleged that in contemplation of law the promise to pay plaintiff's stock at its calculated maturity in 78 months was a mere estimate and not a guaranty that it would mature in that time from its share of earnings of the defendant corporation, plus the payments required thereon from the plaintiff.*"

It was further alleged in the answer that "at the time of the commencement of this action said shares of stock had not matured and become worth the sum of $100 per share and that said stock has not yet matured and become worth $100 per share from the amount paid in thereon by the plaintiff together with the full proportion of earnings of the defendant to which the same is entitled less the *pro rata* share of expenses and losses of the defendant association properly chargeable against said stock."

There were various other specific defenses interposed in the answer not necessary to mention so far as the present discussion is concerned.

Transcript, pp. 4–9, pars. 6, 7, 8, 9.

It will be seen from the foregoing that the real defense of the association upon which it relied was found in the fact that under its articles of incorporation and by-laws and the laws of the State of New York, it had no power to *guarantee* the maturity of

its stock at a fixed or definite time, and also that 31
under those laws and the decisions of the courts of New York construing such laws, the so-called guaranty of maturity was in fact only an estimate as to the time when the maturity of the stock would be attained, it being manifest from a simple arithmetical calculation that payments of seventy-five cents per share per month for a period of 78 months would not equal the par value of the stock at $100 per share, and, therefore, that if it was to attain its maturity value at the expiration of the 78 months' period, it would have to be through its participation in the earnings or profits of the corporation.

Transcript, p. 42, Deposition D. A. Pierce, and p. 44, Deposition Nathan 32
C. Visscher.

It follows that before the courts of South Carolina could adjudge that defendant in error, as plaintiff below, was entitled to recover the amount of the par value of his stock certificates from the association, they were compelled to hold not merely that a contract *ultra vires* of a corporation could be enforced against it under the laws of New York and of South Carolina, but, also, and this is where the first federal question specifically arises, that they would not enforce and give full faith and credit to the statutes of the State of New York under which the association was incorporated, to the decisions of the courts of 33
New York construing those statutes and to the articles of association and by-laws of the corporation, under all of which it is the settled law of the State of New York that a stockholder in a New York building and loan association cannot recover from the association the par or maturity value of his stock until the same has actually reached its par or maturity value by payment of calls or dues thereon, together with accruing profits, and that any stipulations in the stock certificates or literature of the corporation indicating or attempting to fix an earlier or different maturity value, will be treated as mere

34 estimates of maturity, not binding as contracts upon the corporation.

In the case at bar, the Supreme Court of South Carolina, while not in express words refusing to give full faith and credit to the laws of New York in this respect, does in fact, by its decision, refuse to do so, resting it upon the doctrine stated in the case of *Welling* v. *Association*, *supra*, namely, that "The agreement herein is in our opinion injurious to the interests of our people, and whatever may be the laws of New York, we do not think they should be enforced in this State."

56 S. C., 297.

35 XIX.—It appears from Chapter 122 of the laws of New York of 1851, and from the articles of incorporation and by-laws of the corporation, that the plaintiff in error is a purely mutual corporation without any fixed capital, except the sums paid in by its stockholders or members, and that the rights and duties of all stockholders are equal, mutual and reciprocal.

Transcript, pp. 31-35, 47-53, 54-62.

XX.—Section 1 of Chapter 122 of the Laws of New York of 1851, after stating the objects for which corporations of the nature of plaintiff in error may be organized, specifically limits the time
36 and the conditions upon which members shall be entitled to receive from the association the par value of their shares, namely, "when the funds of such association shall amount to a certain sum per share to be specified in the articles of association."

Transcript, p. 31.

Section 4 of the same act expressly authorizes the trustees or directors to require subscribers for stock to pay calls or dues thereon until the stock has been paid up to its par value, the clause in question reading as follows: "It shall be lawful for the trustees to call in and demand from the stockholders re-

spectively all such sums by them subscribed at such 37
time and in such payments or installments as the articles of association shall prescribe."

Transcript, p. 32.

The articles of incorporation of the plaintiff in error provide that "The entrance fee of new members and new shares shall be $1 per share of stock in said association. The monthly dues per share shall be seventy-five cents."

Transcript, pp. 49, 50; Articles of Incorporation, Par. IX.

Section 7 of the New York Act of 1851 reads as follows: 38

"Every such corporation shall terminate except for the purpose of settling its affairs, whenever all the shares thereof shall be redeemed by advances thereon; or whenever the owners of unredeemed shares shall be paid the ultimate value thereof as provided in the articles of association and not sooner, but no dividend of principal or of profits shall be made until such termination; nor until all the debts of the association shall have been paid or otherwise sufficiently provided for. No holder of redeemed shares shall claim to be exempt from making the monthly payment provided in the articles of association, *upon the ground that by reason of losses, or otherwise, the association has continued* 39
longer than was originally anticipated, whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest thereon; nor shall the imposition of fines for non-payment of dues or fees, or other violation of the articles of association, or of any premium for loans made to members, be deemed to be a violation of the provisions of any statute against usury."

Transcript, p. 32.

Section 11 of the Act of 1851 provides that "all shareholders of any association formed under this act

shall be individually liable to the creditors of said association to an amount equal to the amount of stock held by them respectively for all debts contracted by such association."

Transcript, p. 33.

Section 2 of said Act of 1851 authorizes the corporations organized under its provisions in their articles of association to determine "the entrance fee of new members and new shares, the monthly or weekly dues per share, the redemption fee on shares on which advances shall be made, and the fees to be paid on the transfer of shares, the fines or penalties for non-payment of dues or fees, and other violation of the articles of association, the manner of redemption of shares by advances made thereon, the mortgage security to be taken on such advances and how the same may be redeemed or changed, *the manner of transfer or withdrawal of shares*, the manner of investing funds not required for advances on shares, the qualification of voters at the meetings and the mode of voting (and) *the ultimate amount to be paid to the owners of unredeemed shares.*

Transcript, p. 31.

XXI.—The articles of association and by-laws contain no provision of any kind authorizing the payment to any stockholder of the par or maturity value of his stock at the expiration of 78 months from the date of its issue or at any other fixed or definite time. Article XII. does provide that shareholders upon certain conditions may withdraw their contributions to the capital stock of the corporation in advance of the maturity of the stock, but the gist of that provision is, that "upon such withdrawal the holder will be entitled to receive thereon the amount of the monthly installments that have been paid, with such additional interest, if any, as the by-laws may provide, *except that the same shall not exceed the net earnings of said stock.* * * * In

no case shall a withdrawal from the loan fund exceed the amount of the installments paid thereto, together with the estimated amount of the earnings upon the same." 43

Transcript, p. 51; Articles of Incorporation, Par. XII.

Paragraph XV. of the articles of incorporation fixes the par or maturity value of shares at $100 per share.

Transcript, p. 52.

XXII.—Article XI. of the by-laws provides for an expense fund, and that "ten cents per share per month from the monthly payments on stock" 44 shall be placed in this fund and be "devoted to the payment of operating expenses."

Transcript, p. 57; By-laws, Art. XI.

The by-laws further provide that "each share of stock shall be charged with any and all amounts that may be owing from the shareholder or his assigns to the Association, whether in dues, loans, fines, interest or premiums, and all certificates of stock in said association shall, whether mentioned therein or not, be subject to a lien thereon to secure any such indebtedness and the right to deduct and withhold the amount of any such indebtedness is hereby expressly reserved to 45 the association."

Transcript, p. 60.

And they also provide that "all shareholders shall pay, or cause to be paid, a monthly installment of seventy-five cents on each share named in their certificate *until the same shall be fully paid.*"

Transcript, p. 60.

And they also provide that "if shares are withdrawn at any time before maturity, the holders thereof will be entitled to receive the amount paid

46 into the loan fund in monthly payments," plus certain specified percentages of profit in certain cases.
Transcript, p. 60.

XXIII.—It is undisputed that the stock of the defendant in error had not reached its par or maturity value, and that his only right to claim the par value thereof from the association arises upon the provisions in the face of the certificate itself or from the literature of the company, which he claims the corporation is bound by in its relations with him as a stockholder, notwithstanding the provisions of the laws of the State of New York and the articles of incorporation and by-laws of the
47 plaintiff in error. In this connection we direct attention to the fact that under Chapter 564 of the Laws of New York of 1875, the trustees or directors of plaintiff in error would render themselves personally liable by paying to defendant in error the par value of his stock before the maturity thereof, it being manifest that they could only make such payment before the stock had matured out of the funds contributed by other members of the corporation.

XXIV.—Finally, and we regard this as conclusive upon this question, said Chapter 564 of the Laws of New York of 1875 provides that "No holder of re-
48 deemed shares shall claim to be exempt from making the monthly or other stated payments provided in the articles of association upon the ground that by reason of losses or otherwise the association has continued longer than was originally anticipated, whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest thereon."
Transcript, p. 36, Laws of New York, Chapter 564, § 7.

That defendant in error is estopped from charging the plaintiff in error with deceit or fraud in procur-

ing his subscription for stock by representations as to the maturity of the stock in 78 months is shown by the following facts: 49

The association was not incorporated until February 22, 1890 (Transcript, p. 53). Hence it had never matured or paid any stock or demonstrated its earning capacity or rate of profits when Ebaugh's membership began.

He made a formal application for stock during 1892 (Transcript, p. 10) and his stock certificate was issued to him on April 1st, 1892 (Transcript, pp. 10-12). He accepted such stock certificate and seems to have exercised all the rights of membership from that date up to the 17th day of January, 50
1899, when he instituted his action in the State court (Transcript, pp. 2-4).

It certainly must be true that if advanced or borrowing members can be required to continue making payments of dues upon their stock until the same actually reaches its par or maturity value, even though the estimated period of maturity is exceeded, that non-borrowing or mere investing members cannot be permitted to withdraw the par value of their stock in excess of the amount paid in by them thereon at the expiration of the estimated period, and that such is the law of New York is settled by numerous decisions in that State and elsewhere. It is because of the failure and refusal of
the Supreme Court of South Carolina to give full 51
faith and credit to that law and to enforce it according to its clear meaning in the construction of the contract of membership between the plaintiff in error and the defendant in error that a federal question exists upon the face of this record in this case which will necessitate the denial of the motion to dismiss or affirm. Other federal questions also arise upon the face of the record to which attention will be directed later.

In opposition to the motion to dismiss or affirm we now respectfully submit the following brief and authorities.

BRIEF.

I.

UNDER THE LAWS OF NEW YORK, PLAINTIFF IN ERROR IS A PURELY MUTUAL CORPORATION, WHOSE STOCKHOLDERS HAVE EQUAL, MUTUAL AND RECIPROCAL RIGHTS, DUTIES AND OBLIGATIONS, AND NO ONE OF WHOM CAN LEGALLY BE ACCORDED, IN THE STATE OF NEW YORK, ANY ADVANTAGE, PREFERENCE OR PRIORITY OVER ANOTHER.

Ch. 122, Laws of N. Y., 1851, Transcript, pp. 31-35.

Englehardt *v.* Fifth Ward Assn., 148 N. Y., 281.

People *v.* Lowe, 117 N. Y., 175, 180.

Tindall, *C. J.*, in Silver *v.* Barnes, 6 Bing., N. C., 180; 8 Scott, 300; 37 Eng. Com. L., 335.

Robertson *v.* Homestead Assn., 10 Md., 397; s. c., 69 Am. Dec., 145.

Tilley *v.* Am. B. & L. Assn., 52 Fed. Rep., 618, 622.

Thompson on Building Associations (2d Ed.), §§ 3, 4.

"A mutual savings fund and loan association is purely a co-operative society, consisting of a partnership in the profits of money as a money maker, equitably distributed in proportion to the severalties of capital furnished by the individual members thereof."

Wrigley on Building Associations, p. 16.

II.

THE ARTICLES OF INCORPORATION AND BY-LAWS AND THE PROVISIONS OF CHAPTER 122 OF THE NEW YORK LAWS OF 1851, AND CHAPTER 564 OF THE NEW YORK LAWS OF 1875, ARE THE TEST OF THE RIGHTS AND OBLIGATIONS OF THE STOCKHOLDERS OF THE ASSOCIATION, AND BY THEM THE CONTRACT OF MEMBERSHIP MUST BE CONSTRUED, NOT ONLY IN NEW YORK BUT IN EVERY STATE OF THE UNION WHERE THE COURTS MAY BE CALLED UPON TO INTERPRET THE CONTRACT OF MEMBERSHIP.

Const. U. S., Art. IV., § 1.
Relfe *v.* Rundle, 103 U. S., 222, 225, 226.
Canada Southern Ry. *v.* Gebhard, 109 U. S., 527, 537.
Englehardt *v.* Fifth Ward Assn., 148 N. Y., 281.
Chase *v.* Curtis, 113 U. S., 452, 458.
Young *v.* Wempe, 46 Fed. Rep., 354.
Payson *v.* Withers, 5 Biss. (U. S.), 269, 278.
3 Thompson on Corp., § 3046.

And so it has been held by the courts of several States with reference to membership contracts between plaintiff in error and its stockholders.

Bennett *v.* Eastern B. & L. Assn., 177 Pa. St., 233; s. c., 55 Am. St. Rep., 723.
Miller *v.* Eastern B. & L. Assn. (Tenn.), 53 S. W. Rep., 231.

So important and directly in point is a decision of this character by the Supreme Court of Appeals of

Virginia, rendered on December 6, 1900, and not yet officially reported, that we subjoin a copy of such opinion by way of appendix to this brief.

Campbell *v.* Eastern B. & L. Assn., Appendix, *post*, p. 49.

It is settled law that contracts must be construed by the law of the place of performance.

Coghlan *v.* South Carolina R. R. Co., 142 U. S., 101, 109, 110.

Pritchard *v.* Norton, 106 U. S., 124, 136.

Liverpool, etc., Co. *v.* Phœnix Ins. Co., 129 U. S., 397, 458.

Nor can it be denied that the place of performance of a contract of stock subscription with a corporation is at the corporate *situs*.

Penobscot, etc., R. Co. *v.* Bartlett, 12 Gray (Mass.), 244.

1 Thomp. on Corp., § 1259.

3 Thomp. on Corp., § 3046.

And in the case at bar this obligation is fixed by the terms of the stock certificate which constitutes the cause of action of the defendant in error, one of the express conditions embodied on the certificate being: "All payments under this certificate are payable at home office of the Association at Syracuse, N. Y., within sixty days after the acceptance and approval of satisfactory proofs."

Transcript, p. 11.

Another provision of the certificate is that: "Any action brought against this Association shall be commenced within six months after filing proofs, and in the County of Onondaga and State of New York."

Transcript, p. 12.

The by-laws also provide as follows: "All remittances for advance instalments, premiums, monthly

instalments, fines and penalties, interest and premiums and all other payments shall be made to the Secretary of the Association at the Home office."

By-Laws, Art. XIV., § 16, Transcript, p. 60.

III.

UNDER THE LAWS OF NEW YORK AND THE ARTICLES OF ASSOCIATION AND BY-LAWS OF PLAINTIFF IN ERROR DEFENDANT IN ERROR COULD NOT, IN THE STATE OF NEW YORK, MAINTAIN AN ACTION OR RECOVER UPON HIS CERTIFICATE THE PAR OR MATURITY VALUE THEREOF IN ADVANCE OF THE ACTUAL MATURITY OF THE STOCK.

O'Malley *v.* People's Assn., 92 Hun (N. Y.), 572.
House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.
Heslin *v.* Eastern B. & L. Assn., 28 Misc. (N. Y.), 376, 378.
People *v.* Lowe, 117 N. Y., 175.
Englehardt *v.* Fifth Ward Assn., 148 N. Y., 281.
See also the provisions of the Act of 1851 of N. Y. and the Articles of Incorporation and By-Laws of Plaintiff in error, which expressly so provide, *ante*, pp. 12–16, fols. 35–48.

Notwithstanding that such is the settled law of New York, the Supreme Court of South Carolina affirmed the decision of the Court below, giving the defendant in error judgment for the *full par value* of his stock, although it affirmatively appeared by

undisputed evidence that the law of New York was as here stated, and that the stock had not matured. *Ante*, pp. 4, 9, 10, 11, fols. 10–12; 25–32.

We submit that by this judgment the Supreme Court of South Carolina (*a*) failed and refused to give full faith and credit to the laws and judicial proceedings of the State of New York in violation of § 1, Art. IV. of the Constitution of the United States, and to § 905 of the Revised Statutes of the United States; and (*b*) denied to plaintiff in error equal protection of the laws in contravention of the XIVth amendment to the Constitution of the United States; and (*c*) impaired the obligation of a contract in violation of § 10, Art. I. of the Constitution of the United States; and (*d*) deprived plaintiff in error of its property without due process of law in violation of the XIVth Amendment to the Constitution.

These Federal questions were fully raised in the courts below, and instead of being "frivolous," present as grave problems of constitutional right as any that have recently invoked the consideration of this Court.

IV.

BUT IT IS CONTENDED IN THE BRIEF IN SUPPORT OF THE MOTION TO DISMISS THAT NO FEDERAL QUESTION ARISES IN THIS CASE BECAUSE THE SUPREME COURT OF SOUTH CAROLINA DID NOT REST ITS DECISION UPON THE *express* DENIAL OF "FULL FAITH AND CREDIT" TO THE LAWS OF NEW YORK AS IT DID IN THE *Welling* CASE (*ante*, p. 7, fol. 19).

We meet this contention with the following propositions:

The judgment of the Supreme Court of South Carolina in favor of the defendant in error could

not have been rendered if the contract obligations of defendant in error as a *stockholder* in the Eastern Building and Loan Association had been determined in accordance with the laws and judicial decisions of New York as they would have been in the courts of New York.

The test of compliance with the rule of constitutional obligation that full faith and credit shall be given in each State to the laws of every other State, is that the same effect shall be given to them that would be given to them by the courts of such other State.

Chicago, &c., R. R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615.

There is no pretense in the opinion of the Supreme Court of South Carolina—or if there is, it is a *mere pretense*—that under the New York Act of 1851 and the articles of incorporation and by-laws of the Eastern Building and Loan Association, defendant in error was entitled to receive from the association the full par value of his stock before the actual maturity of the stock.

That Court accepts the pitiful evasion of the Referee and the Court below, that because the courts of New York have held in several cases that a corporation cannot avail itself of the plea of *ultra vires* as against a contract which has been performed in good faith by the other party, therefore a *stockholder* in a corporation is entitled to withdraw his contribution to the capital stock in direct violation of the corporate charter and the law under which the corporation was organized, merely because the *estimated* period of stock maturity has expired.

Transcript, pp. 64, 67.

This must rest upon the doctrine that a corporation of a purely mutual character can bind itself in violation of its charter powers by a guaranty that its stock shall have a certain value at a certain time, or earn a certain rate of dividends.

Yet nothing is better settled than that corporations cannot bind themselves by such guaranties and that dividends can be paid only from profits.

1 Morawetz on Corp. (2d Ed.), §§ 444, 457.

Mobile, etc., R. Co. *v.* Tennessee, 153 U. S., 486, 496.

New York, etc., R. Co. *v.* Nickals, 119 U. S., 296, 305, 306.

Elevator Co. *v.* Memphis, etc., R. Co., 85 Tenn., 703; s. c., 4 Am. St. Rep., 798.

2 Thompson on Corp, § 2152.

And this is particularly true of building and loan associations because of their strictly mutual character.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.

Miller *v.* Eastern B. & L. Assn. (Tenn.), 58 S. W. Rep., 231.

King *v.* International Bldg. etc., Union, 170 Ill., 135.

So the statute of New York, under which plaintiff in error is organized, expressly forbids the declaration or payment of any dividends to shareholders except from the earnings of the association.

"§ 7. The trustees of any association formed under the provisions of this act may, from time to time, declare dividends *from the earnings* of the association, payable in such manner as may be provided in the articles of association; *but no dividend shall be declared except from the earnings of the association.*"

Laws of N. Y., 1875, Ch. 564, § 1, amending Laws of N. Y., 1851, Ch. 122, § 7.

This leaves nothing for "construction" or "interpretation" so far as the contract between plain-

tiff in error and defendant in error, as a stockholder, is concerned.

But the Supreme Court of South Carolina says: "Both the Master and Circuit Judge find as matter of fact that the laws of New York do not forbid the defendant from entering into an agreement by which the shares would mature in a definite time" (Transcript, p. 67), and the Court adds that such finding is conclusive. Yet there is not a "scintilla" of evidence in the record upon which such a finding *as a finding of fact* can be based, all the *evidence* being directly and conclusively to the contrary.

Ante, p. 4, fols. 10-12.

However, the Supreme Court of South Carolina confutes itself and confounds its own logic by citing three New York cases which were offered in evidence by the plaintiff below as constituting "the only evidence" on this point. Those cases are: *Whitney Arms Co.* v. *Barlow*, 63 N. Y., 62; *De Graff* v. *American Linen Thread Co.*, 21 N. Y., 124; *Diamond Match Co.* v. *Roeber*, 106 N. Y., 473.

We commend these cases to the careful examination of this Court. They are, by the South Carolina Court, supposed to prove that a stockholder in a mutual corporation can withdraw from the capital of the corporation more than he has contributed thereto, and more than his profits, and thereby force the corporation to guarantee the maturity of his stock and a fixed rate of interest upon it in violation of the express provisions of the New York law and of the corporate charter and by-laws!

The case of *DeGraff Linen Thread Company* was that of a sale by a corporation to an outside party dealing with the corporation at arm's length, and the corporation having received the *full consideration* was not permitted to rely upon its lack of authority. No question of an attempt to guarantee profits to a stockholder was involved, nor did the plaintiff there seek to recover from the corporation

something for which he had given *no consideration*, as in the case at bar.

Whitney Arms Co. v. *Barlow* is still less in point, as it merely lays down the rule that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party. No question between stockholder and corporation was involved, none as to the right to guarantee the value of stock or its rate of earnings.

The case of *Diamond Match Co.* v. *Roeber* is equally beside the mark, involving as it does a contract in restraint of trade and a branch of the doctrine of estoppel.

No question between stockholder and corporation exists in either of these three cases. How these three cases could prove as *matter of fact* what the Supreme Court of South Carolina says they do, is beyond ordinary comprehension.

On the other hand, the law of New York upon the question of the charter powers of plaintiff in error and the contract rights of defendant in error as a stockholder in the association was proven by undisputed evidence in direct conformity with the rule laid down by this Court in the *Wiggins Ferry* case.

Ante, pp. 4–5, fols. 10–14.
Chicago, &c., R. R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615.

The Supreme Court of South Carolina will not be permitted to ignore this undisputed proof upon the very point in issue and under the guise of "construing" a contract not only impair the obligation of the contract but deprive plaintiff in error of its property and refuse to give *any* faith or *any* credit to the express provisions of the statutes of New York and the plain, unequivocal decisions of the courts of New York applying and interpreting those statutes. It has been well said by one of the great Judges of this Court: "We shall never immolate truth, justice and

the law because a State tribunal has erected the altar and decreed the sacrifice."

Swayne, *J.*, in Gelpecke v. Dubuque, 1 Wall., 175, 206.

The entire contention of counsel for defendant in error in support of the motion to dismiss or affirm is really embodied in the following quotation from their brief:

"The statutes introduced in evidence by the defendant do not, in express terms, forbid building and loan associations from making such contracts as that made with Ebaugh. The conclusion that such contracts are forbidden by these statutes can be reached only by construction. Mere errors in the construction of the statute of another State furnishes no basis for a federal question."

Brief for Defendant in Error in support of Motion, p. 5.

Later on they insist that "reference to the proceedings in the State courts in the case at bar will conclusively show that the validity of the New York statutes was not denied, and that the error, if any, was in their construction."

Brief for Defendant in Error, p. 6.

They then quote the Referee's report in the trial Court to prove their contention.

Brief for Defendant in Error, pp. 6 and 7.

By the quotation made it appears that the learned Referee satisfied his conscience and "construed" the laws of New York by saying: "I do not see why such an association may not issue stock *to be fully paid up* (the italics are ours) by seventy-eight monthly payments and to be redeemed at par at the end of that time."

Brief for Defendant in Error, p. 7.

Neither do we see why seventy-eight monthly payments that *fully paid* up the stock would not mature it!

But that is not the question here, either as one of "construction" or otherwise.

The point is that seventy-eight monthly payments of *seventy five cents per month* do not amount to one hundred dollars, but only to *fifty-eight dollars and fifty cents!* Hence the stock has not matured unless the "dividends" credited from profits are sufficient to mature it—that is to carry it to its par value—and in the case at bar the *undisputed* evidence was that the stock had not attained its maturity value.

Transcript, p. 16, evidence of D. W. Ebaugh.

Transcript, pp. 43, 44, 45, 46, evidence of N. C. Visscher.

That he had only made seventy-eight monthly payments of seventy-five cents each upon each share, defendant in error admits in the complaint filed by him as plaintiff below.

Transcript, pp. 2 and 3; Paragraphs V., VI. and VII.

The answer of the defendant corporation denied that the stock had matured.

Transcript, pp. 6-9, Paragraphs "Fifth," "Seventh," "Eighth" and "Twelfth."

Defendant in error, as plaintiff below, offered no evidence of the maturity of the stock, and the evidence for plaintiff in error, as defendant below, affirmatively proved that it had not matured.

Hence the "conclusion" of the Referee, as above quoted, is either beside the mark or a mere pretext upon which to deprive plaintiff in error of its property and to refuse to give full faith and credit to the laws of New York.

The laws of New York were not "construed," they were ignored!

The only question was whether the *undisputed* laws of New York and the plain provisions of the New York statutes should be held to govern the case, or whether it should be decided as it was in the Welling case, that: "*Whatever may be the laws of New York, we do not think they should be enforced in this State*"?

Ante, p. 7, fol. 19.

The decision of the Supreme Court of South Carolina was that the statutes and decisions of New York should not be given full faith and credit, but that on the pretense of "construction" the "federal question" should be eliminated, if possible.

That it has not been and cannot be so eliminated is manifest upon the face of the New York statutes, the plain meaning of which, even though there were not, as there are, half a score of New York cases so construing them, is that defendant in error cannot recover the par value of his stock until it has become matured,—that is, fully paid,—either by his payments of "dues" or "calls" at the rate of seventy-five cents per month, or by such payment plus a *pro rata* share of the profits, credited as dividends.

There was expert testimony as to the laws of New York and their construction by the courts of New York upon this point, and that evidence was not rebutted or impeached in any way.

Transcript, p. 42, evidence of D. A. Pierce.

Such evidence was corroborated by the giving in evidence of a case decided by the General Term of the Supreme Court of New York, and is conclusive.

O'Malley *v.* People's B. & L. Assn., 92 92 Hun (N. Y.), 572; Transcript, p. 38.

Chapter 122 of the Laws of New York of 1851 expressly provides that: "It shall be lawful for the trustees to call in and demand from the stockholders respectively, all such sums of money by them subscribed, at such times and in such payments or instalments as the articles of association shall prescribe."

Transcript, p. 32, paragraph 4.

The articles of incorporation of the association accordingly provide that: "The monthly dues per share shall be seventy-five cents."

Transcript, p. 50.

And the by-laws contain the following provisions on the same subject:

Sec. 13. Each share of stock shall be charged with any and all amounts that may be owing from the shareholder or his assigns to the association, whether as dues, loans, fines, interest or premiums, and all certificates of stock in said association shall, whether mentioned therein or not, be subject to a lien thereon, to secure any such indebtedness, and the right to deduct and withhold the amount of any such indebtedness is hereby expressly reserved to the association.

Sec. 14. *All shareholders shall pay, or cause to be paid, a monthly instalment of seventy-five cents on each share named in their certificate, until the same shall be fully paid;* said instalment to be paid to the association on or before the last Saturday of each month. Shareholders are required to pay monthly instalments without notice.

Transcript, p. 60, By-laws, Art. XIV., §§ 13 and 14.

There is no "construction" needed. The language is plain and unequivocal.

After his seventy-eight seventy-five cents per share monthly payments had been made defendant in

error was notified by the association that his shares had not matured, and that he must either continue his monthly payments until maturity or withdraw his stock at its withdrawal value.

Transcript, p. 46,
Letter of C. A. Pooler, Secy. to D. W. Ebaugh.
See also: Transcript, pp. 44, 45.

Defendant in error refused to continue his payments or to accept the withdrawal value of the stock and brought his action in the State court to recover the par value of his stock, although such stock was only a little more than half paid in. Had his demand for payment in full been complied with the directors of the association would have been violating the express and unequivocal provisions of the two New York statutes under which the association was incorporated.

Laws of N. Y., 1851, Ch. 122, § 7, Transcript, p. 32; as amended,
Laws of N. Y., 1875, Ch. 564, § 1, Transcript, pp. 35 and 36.

Taking these several provisions of the statutes of New York and the articles of incorporation and by-laws of plaintiff in error into consideration, it will be seen that they repeatedly provide that a stockholder must pay his monthly payments until his stock reaches its par value, and that if he withdraws before maturity, he can only have the withdrawal and not the par value of the stock, and such withdrawal value is limited to "the amount of the monthly instalments that have been paid with such additional interest (dividends), if any, as the by-laws may provide, *except that the same shall not exceed the net earnings of the stock.*"

Transcript, p. 51, Articles of Incorporation, ¶ XII.

The by-law provisions relating to withdrawals contain like limitations.

Transcript, p. 60, By-Laws, Art. XIV., §§ 18 and 19.

In the light of these statutory provisions and the terms of the articles of association and by-laws of plaintiff in error conforming to them, is it not manifest, that in requiring payment to defendant in error of the par value of his stock, the Supreme Court of South Carolina did not content itself with "construing" the contract and the laws of New York, but instead impaired the obligation of the contract, denied the plaintiff in error the equal protection of the laws, deprived it of its property, without due process of law, and necessarily and directly refused to give "full faith and credit" to the laws of New York?

V.

NOT ONLY DOES THE JUDGMENT OF THE SUPREME COURT OF SOUTH CAROLINA DENY FULL FAITH AND CREDIT TO THE LAWS OF NEW YORK, BUT IT ALSO DEPRIVES PLAINTIFF IN ERROR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, DENIES TO IT THE EQUAL PROTECTION OF THE LAWS, IMPAIRS THE OBLIGATION OF A CONTRACT, AND DENIES TO PLAINTIFF IN ERROR ANY REMEDY IN THE COURTS OF SOUTH CAROLINA UPON A CONTRACT VALID UNDER THE LAWS OF NEW YORK AS THE PLACE BOTH OF THE MAKING AND PERFORMANCE OF SUCH CONTRACT.

A decision of a State court having such effects as these cannot meet with the approval of this Court, must be in direct contravention of several provisions of the Constitution of the United States, and

stands condemned by numerous decisions of this Court.

"It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this Court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this Court should, or could, with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion."

Jefferson Branch Bank *v.* Skelly, 1 Black, 436, 443.

McCullough *v.* Virginia, 172 U. S., 102, 109.

This Court when called upon to interpret a contract made under the laws of a State looks first to the decisions of the courts of such State in determining the meaning and construction of the laws under which the contract was made.

Sioux City R. Co. *v.* North American Trust Co., 173 U. S., 99, 100.

In like manner the courts of every State are required by the Constitution to give full faith and

credit to such laws and decisions, if properly given in evidence, when construing a contract entered into and to be performed in a sister State.

Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615.

And the right of the parties to contract under and subject to the laws of New York neither the legislature nor the courts of South Carolina can abridge or deny.

R. S. U. S., § 1977.
Yick Wo *v.* Hopkins, 118 U. S., 356, 369.
Santa Clara Co. *v.* Southern Pacific R. Co., 118 U. S., 394, 396.

The contract of membership of defendant in error with plaintiff in error, being a contract made and to be performed in the State of New York, must not only be construed in accordance with the laws of New York, but the Courts of South Carolina are forbidden by the XIVth amendment to the Constitution of the United States to deny to plaintiff in error the "equal protection of the laws" by refusing to enforce it in that State in accordance with the laws of New York.

Allgeyer *v.* Louisiana, 165 U. S., 578.
Holden *v.* Hardy, 169 U. S., 366, 391.

And any failure to so enforce the contract is a denial of "full faith and credit" to the laws of New York.

Huntington *v.* Attrill, 146 U. S., 657, 666.

It should not be overlooked that this litigation, instead of being instituted in the jurisdiction of the corporate situs, as it should have been (Clark *v.* Mutual Reserve Fund Life Assn. (D. C.), 43 L. R. A., 390, 397; Taylor *v.* Mutual Reserve Fund Life Assn. (Va.), 45 L. R. A., 149; Leary *v.* Columbia River, &c., Co., 82 Fed. Rep., 775; Sidway *v.* Missouri Land, &c., Co., 101 Fed. Rep., 481: Republican

Mountain Silver Mines *v.* Brown, 58 Fed. Rep., 644), was begun in South Carolina by defendant in error *seeking affirmative relief*, and prosecuted to judgment there upon the principle that the courts of South Carolia were not bound to enforce contracts made and performable in New York, in accordance with New York laws, but could enforce the New York law so far as it was advantageous to defendant in error, and deny the application of plain, unequivocal, statutory provisions of New York when adverse to his interests. This may be "due process of law," but if so it is neither justice nor honesty, nor does it accord to plaintiff in error the "equal protection" of the laws which the XIVth amendment guarantees.

The contention of defendant in error is in effect that this contract with the plaintiff in error is not embodied in the stock certificate, articles of incorporation and by-laws, taken together, but is limited to the provisions of the stock certificate, and that there is in fact no such contract as that claimed by plaintiff in error; and the courts of South Carolina, by ignoring the provisions of the New York statutes and of the articles of association and by-laws and the decisions of the New York courts, virtually sustain this contention.

"We have often had occasion to say that this Court, when reviewing the final judgment of a State Court upholding a State enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for itself the existence or the non-existence of the contract set up, and whether its obligation has been impaired by the State enactment."

Chicago, &c., R. *v.* Nebraska, 170 U. S., 57, 68.

Von Hoffman *v.* Quincy, 4 Wall., 535, 550.

If this Court thus protects a contract against State legislation under the contract clause of the Federal Constitution, will it not protect a contract

against the decision of a State court which refuses full faith and credit to the laws of a sister State and abrogates a contract upon the pretense of construing it? Repudiation and confiscation are not "construction" and "interpretation."

See Western Mass., &c., Ins. Co. *v.* Hilton, 42 App. Div. (N. Y.), 52, 58, 59.
Chicago, &c., R. Co. *v.* Wiggins Ferry Co., 108 U. S., 18, 22.
Chicago, &c., R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615.

The decision of the Supreme Court of South Carolina in the case at bar denies to plaintiff in error all remedies upon its contract with defendant in error as a stockholder and refuses to hold him to his obligations as such. No State can so deny the enforcement within its jurisdiction of valid contracts under the laws of a sister State.

Edwards *v.* Kearzey, 96 U. S., 595, 600, 601.
The Homestead Cases, 22 Gratt. (Va.), 266; s. c., 12 Am. Rep., 507, 514, 515.
White *v.* Hart, 13 Wall., 646, 654.
Cæsar *v.* Cappell, 83 Fed. Rep., 403.
Eastern Building & Loan Assn. *v.* Bedford, 88 Fed. Rep., 7.
Allgeyer *v.* Louisiana, 165 U. S., 578.

It also seems to us that the decision of the Supreme Court of South Carolina deprives plaintiff in error of its liberty to contract and of its property without "due process of law."

The effect of the decision is to require plaintiff in error, in violation of the statutes of New York and the provisions of its charter and by-laws, to pay defendant in error a sum of money for each share of stock held by him, largely in excess of payments made by him upon the stock, plus his *pro rata* share

of the profits of the corporation (*ante*, p. 28). This certainly deprives the corporation of its property and interferes with its liberty of contract. But does it do so without "due process of law"?

"This Court has never attempted to define with precision the words 'due process of law.'"
Holden *v.* Hardy, 169 U. S., 366, 389.

But the constitutional restriction undoubtedly applies to the *judicial* as well as to the executive and legislative powers of a State.
Murray's Lessees *v.* Hoboken Land Co., 18 How., 272, 276.

Hence, we submit that a State court cannot by *judicial legislation* abrogate a contract valid in another State, entered into under the laws of that State and performable in such other State, without violating that clause of the XIVth amendment to the Constitution of the United States, which provides that no State "shall * * * deprive any person of life, liberty or property without due process of law."
Holden *v.* Hardy, 169 U. S., 366, 390, 391.
Allgeyer *v.* Louisiana, 165 U. S., 578.

"For 'upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them;' and 'if they fail therein, and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be de-

cided to this court for final and conclusive determination.'"

In re Wood, 140 U. S., 278, 286.
Robb *v.* Connolly, 111 U. S., 624, 637.
Neal *v.* Delaware, 103 U. S., 370, 386, 387.

We are aware that it has been held by this Court that only State statutes, not judicial decisions, impair the obligation of a contract within the meaning of § 10, Art. I. of the Constitution of the United States.

New Orleans Water Works Co. *v.* Louisiana Sugar Co., 125 U. S., 18, 30.
Knox *v.* Exchange Bank, 12 Wall., 379, 383.

But notwithstanding these decisions we direct attention to the opinions of the Supreme Court of South Carolina in the case at bar and in the Welling case (Transcript, p. 67; 56 S. C., 280), as virtually "Laws" of South Carolina made subsequent to the contract between the parties and beyond question impairing the obligation of the contract.

Why such a "law" is not within the meaning of the constitutional provision in a case like this seems by no means clear. At any rate, the decision in the case at bar did deny the equal protection of the laws to plaintiff in error, and did refuse full faith and credit to the laws of New York.

It would certainly be anomalous to hold that a contract made and to be performed in New York and valid under the laws of New York could be impaired as to its obligation by the Supreme Court of South Carolina, at the suit of a party resident in that State, in violation of the plain terms of the contract and of the laws of New York, without the denial of full faith and credit to the laws of New York. Yet such is the effect of the contention of counsel for defendant in error in this case.

VI.

THAT A BUILDING AND LOAN ASSOCIATION CANNOT BY CONTRACT FIX THE MATURITY PERIOD OF ITS STOCK SO AS TO GUARANTEE AN ESTIMATED RATE OF PROFITS OR EARNINGS IS SETTLED LAW, NOT ONLY IN NEW YORK BUT IN EVERY JURISDICTION WHERE THE QUESTION HAS DIRECTLY ARISEN.

King *v.* International Assn., 170 Ill., 135, 142.
Royal Trust Co. *v.* Culver, 87 Ill. App. Rep., 630.
Bertche *v.* Equitable Loan Assn., 147 Mo., 343.
Schell *v.* Equitable, etc., Assn., 150 Mo., 103.
Province *v.* Interstate B. & L. Assn. (Tenn.), 58 S. W. Rep., 265.
Heslin *v.* Eastern B. & L. Ass'n, 28 Misc. (N. Y.), 376, 378.

And it is equally well settled that the contracts of such associations with their members must be construed in accordance with the laws and judicial decisions of the State of the corporate *situs* and the terms of the corporate charter.

Bennett *v.* Eastern B. & L. Assn., 177 Pa. St., 233; s. c., 55 Am. St. Rep., 723, 726, 727.
Miller *v.* Eastern B. & L. Assn. (Tenn.), 53 S. W. Rep., 231.
Campbell *v.* Eastern B. & L. Assn. (Va.), Appendix, p. 49.
Eastern B. & L. Assn. *v.* Bedford, 88 Fed. Rep., 7.

Such is the general doctrine with relation to corporate contracts.

Washington Cent. Bk. *v.* Hume, 128 U. S., 195, 206, 207.

Coghlan *v.* So. Carolina R. Co., 142 U. S., 101, 109.

Pritchard *v.* Norton, 106 U. S., 124, 136.

Nor can the contention of the defendant in error that he was induced to become a stockholder by representations that the stock would mature in seventy-eight months avail him as against this doctrine.

Upton *v.* Tibilcock, 91 U. S., 45, 50.

VII.

THE EXISTENCE OF "A FEDERAL QUESTION" IN THIS CASE, HAS, WE THINK, BEEN DEMONSTRATED.

WE SUBMIT THAT THE FEDERAL QUESTIONS SO SHOWN BY THE RECORD WERE FULLY RAISED AND PRESENTED IN THE STATE COURT; THAT THE DECISION OF THE SUPREME COURT OF SOUTH CAROLINA WAS AGAINST THE CONSTITUTIONAL RIGHTS CLAIMED BY PLAINTIFF IN ERROR, AND THAT, THEREFORE, THIS CASE WAS PROPERLY BROUGHT TO THIS COURT BY WRIT OF ERROR.

"But the true and rational rule is, that the Court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

Bridge Proprietors *v.* Hoboken Co., 1 Wall., 116, 143.

"We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

Chapman *v.* Goodnow, 123 U. S., 540, 548.
Roby *v.* Colehour, 146 U. S., 153.
Dewey *v.* Des Moines, 173 U. S., 193, 199.
Keokuk, &c., Bridge Co. *v.* Illinois, 175 U. S., 626, 634.

It has already been pointed out that the "Federal questions" were specifically raised in the Court below; relied upon there, and by that court decided adversely "by necessary intendment" to the claims of plaintiff in error.

Ante, pp. 6–9, fols. 16–25.

And where the Federal question was necessarily raised and must have been decided adversely to the claim of plaintiff in error this Court will not dismiss the writ of error.

Eureka Lake, &c., Company *v.* Superior Court, 116 U. S., 410.
Des Moines, &c., Co. *v.* Iowa Homestead Co., 123 U. S., 552.
Green *v.* Van Buskirk, 5 Wall., 307.

VIII.

THE CASES RELIED UPON BY COUNSEL FOR DEFENDANT IN ERROR ARE NOT IN POINT AND DO NOT ESTABLISH THEIR PROPOSITIONS: (*a*) THAT NO FEDERAL QUESTION IS INVOLVED, OR (*b*) THAT THE DECISION OF THE SUPREME COURT OF SOUTH CAROLINA ONLY INVOLVED THE "CONSTRUCTION" OF THE LAWS OF NEW YORK AND DID NOT DENY TO THEM "FULL FAITH AND CREDIT."

Briefly reviewing the principal cases cited by counsel for defendant in error, we find:

1. The case of *Glenn* v. *Garth* is not in point, because as MR. CHIEF JUSTICE FULLER, who delivered the opinion in that case and granted the writ of error in this one, well says: "This record may be searched in vain for any proof that, as matter of fact, the public acts of Virginia had, by law or usage in Virginia, any other effect than was given them in New York."

Glenn *v.* Garth, 147 U. S., 360, 369.

In the case at bar the evidence to show this is clear, uncontradicted and conclusive.

Ante, pp. 3-5, 12-16, fols. 8-14, 35-48.

2. In *Lloyd* v. *Matthews*, the laws of Ohio were not proved as a fact in the Kentucky court, and, therefore, the Court of Appeals of that State "was obliged to determine the case on the record, and plaintiff in error had failed to plead the construction given the Ohio Statutes by the courts of Ohio, or to introduce the printed books of cases adjudged in the State of Ohio, or to prove the common law of that State by the parol evidence of persons learned in that law, or to put in evidence the laws of that State as printed under the authority

thereof or a certified copy thereof." * * * "The Court of Appeals was left, therefore, to construe the parts of the Ohio laws that were pleaded as it would local laws; and it is settled that *under such circumstances*, where the validity of a State law is not drawn in question but merely its construction, no Federal question arises."

Lloyd *v.* Matthews, 155 U. S., 222, 227.

In the case at bar everything that this Court says was not done in the case just cited, to prove the State laws, was done, and proof having been made of the State statutes of New York and their construction by the courts of New York full faith and credit must be given to such statutes and to the New York decisions construing the same.

Hanley *v.* Donoghue, 116 U. S., 1, 3.

"It does not seem to have occurred to the Chief Justice (Taney) that the writ could be maintained upon the ground of a denial of full faith and credit to the Mississippi Statute by the construction given by the Louisiana Court."

Fuller, *C. J.*, in Glenn *v.* Garth, 147 U. S., 369.

3. The case of *Banholzer* v. *New York Life Ins. Company* rests upon the authority of Glenn *v.* Garth and Lloyd *v.* Matthews and clearly was not intended to go beyond the doctrine of those cases. "*The parties mutually agreed* that this should be a New York contract and construed according to the laws of that State. The decisions of the highest Court of that State as to the construction of such a contract and of the statutes of New York must therefore be accepted as conclusive upon the parties." So said the Supreme Court of Minnesota in that case (178 U. S., 406, 407). Later, in a second opinion the Minnesota Court reviewed the contention that the case before it was "distinguishable" from the New York case which had been followed in the first opinion;

queried whether the construction of the New York Statute by the New York court was binding *if the construction of the statute was not necessary to the decision* (Carroll *v.* Carroll, 16 How., 275, 286, 287), and then pretermitted the question so raised, saying: "We shall not decide that question, as we are satisfied that if the construction of the New York statute is to be considered *res integra* the notice required by it was not applicable," &c. (178 U. S., 408). On such a state of facts this Court granting, *arguendo*, that the Supreme Court of Minnesota had erred in its construction of the New York case and the New York statute, yet held, that as the validity of the statute was not denied and its meaning was first sought in a decision of the New York courts, the case fell within the doctrine of *Glenn* v. *Garth* and *Lloyd* v. *Matthews*, *supra*.

Banholzer *v.* New York Life Ins. Co.,
178 U. S., 408.

There is no analogy between the *Banholzer case* and the case at bar.

In this case the full faith and credit clause of the Federal Constitution was expressly invoked. It was insisted that under that clause the New York statutes, and an authority and franchise exercised under them, must be given the same effect given them by the courts of New York. The decision of the Supreme Court of South Carolina, denies them that effect and relies upon the *Welling case*, decided by the same Judge, in which it was held that: "Whatever may be the laws of New York, we do not think they should be enforced in this State" (*Ante*, p. 7). Relying upon this doctrine the Supreme Court of South Carolina, say in the case at bar: "We fail to discover any facts causing us to differentiate this case from those hereinbefore mentioned."

Transcript, pp. 67, 68.

It is for this Court to say, and it is its duty under the Constitution to determine, whether in this de-

cision the Supreme Court of South Carolina gave to the laws of New York and the contract made under *those* laws the same effect that such laws and contract have in the courts of New York.

Green *v.* Van Buskirk, 5 Wall., 307, 311, 314.
Christmas *v.* Russell, 5 Wall., 290, 302.
Mills *v.* Duryee, 7 Cr., 481, 483, 484.
Carpenter *v.* Strange, 141 U. S., 87, 103.
Dupasseur *v.* Rochereau, 21 Wall., 130, 139.
Huntington *v.* Attrill, 146 U. S., 657, 666.
Chicago, &c., R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615, 622, 624.
Chicago, &c., R. Co. *v.* Stevens, 174 U. S., 710.

"It was insisted on the one side, and denied on the other, that the faith and credit which the judicial proceedings in the courts of the State of Illinois had by law and usage in that State, were denied to them by the Supreme Court of New York in the decision which was rendered.

"Whether this was so or not could only be properly considered when the case came to be heard on its merits; but this Court, in denial of the motion to dismiss, held that the Supreme Court of New York necessarily decided *what* effect the attachment proceedings in Illinois had by the law and usage in that State; and as it decided against the effect which Green claimed for them, this Court had jurisdiction under the clause of the Constitution which declares 'that full faith and credit shall be given in each State to the public acts, records and judicial proceedings in every other State,' and the Act of Congress of 1790, which gives to those proceedings the same faith and credit in other States that they have in the State in which they were rendered."

Green *v.* Van Buskirk, 7 Wall., 139, 145.

That the opinion of the Supreme Court of South Carolina in the case at bar denies the claims of the plaintiff in error under the laws of New York, and denies full faith and credit to those laws is manifest upon the face of the opinion.

Transcript, pp. 67 and 68.

That the opinion is itself a part of the record in the case, and, therefore, may be looked to as such is shown by the certificate of the Clerk of the Supreme Court of South Carolina, wherein it is recited: "I do further certify that the opinion rendered by the Court in said case is a part of the record of said case."

Transcript, p. 1.

Hence, this Court may look to the opinion of the Supreme Court of South Carolina, as it does to opinions in cases coming up from the Supreme Court of Louisiana.

New Orleans Waterworks *v.* Louisiana Sugar Co., 125 U. S., 18, 27.

Eagan *v.* Hart, 165 U. S., 188, 189.

Murdock *v.* Memphis, 20 Wall., 590, 633.

And the federal question having been raised and decided adversely to the contention of plaintiff in error this Court has jurisdiction to determine this case upon its merits and the motion to dismiss or affirm should be denied.

We do not deem it necessary to further review the cases cited by counsel for defendant in error to show that the Supreme Court of South Carolina did not refuse to be bound by the decisions of the court of last resort of New York.

Brief for Defendant in Error, pp. 8 and 9; *ante*, p. 42.

We think it has already been demonstrated that the Supreme Court of South Carolina refused to

give full faith and credit to the laws and judicial proceedings of the State of New York.

The plain language of the New York statutes needs no interpretation or construction. Those statutes were merely denied effect by the Supreme Court of South Carolina because that Court regarded itself as not bound "by comity" to give them effect. Thus the rule of constitutional obligation was ignored and the jurisdiction of this Court established.

What the New York law is we have already discussed sufficiently for the purposes of the motion now before the Court. Upon a hearing on the merits that question will properly call for full consideration.

Green *v.* Van Buskirk, 5 Wall., 307; s. c. 7 Wall., 139.

Admittedly the *O'Malley case*, relied upon by plaintiff in error, was a direct authority in support of the contention of plaintiff in error as to the meaning and effect of the New York law.

Brief for Deft. in Error, p. 8.
Transcript, p. 38; s. c., 92 Hun (N. Y.), 572.

It makes no difference that the O'Malley case was not decided by the court of last resort; it was not appealed from and has recently been followed in New York by the decision of a Court that in such a case, when the decision is unanimous, is a court of last resort.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.
Code of Civil Procedure of N. Y. (1900), § 191.

That such decisions are entitled to full faith and credit in the Courts of sister States is settled by the decisions of this Court.

Hollinger *v.* Davis, 146 U. S., 314, 319.

Besides, the decisions in the Court of Appeals of New York in the several cases which plaintiff in error gave in evidence upon the trial of this case below, construe the New York Acts of 1851 and 1875, and together with the articles of association and by-laws of plaintiff in error, are conclusive as to the construction and effect of the New York statutes in question in New York.

Concordia Ass'n *v.* Read, 93 N. Y., 474.
People *v.* Lowe, 117 N. Y., 175.
Englehardt *v.* Fifth Ward Ass'n, 148 N. Y., *281.*

The question as to what the common law of New York is apart from the statutes under consideration, does not arise in this case and hence we shall not follow counsel for defendant in error in their discussion on that subject.

Brief for Defendant in Error, pp. 10–12.

Having, as we believe, shown the existence of a federal question; the decision of that question adversely to the claims of plaintiff in error, the incorrectness of such decision and the gross denial of justice incident thereto, we ask that the motion to dismiss or affirm be denied, and that this case stand for hearing upon its merits. We shall be glad to consent to its advancement in order that it may be argued orally with the Welling and Bennoitt case, which will shortly be reached upon the call of the term calendar of this court.

Respectfully submitted,

Wm. Hepburn Russell,
Wm. Beverly Winslow,
Counsel for Plaintiff in Error.

APPENDIX "A."

Supreme Court of Appeals of Virginia.

CAMPBELL v. EASTERN BUILDING AND LOAN ASSOCIATION OF NEW YORK.	RICHMOND, December 6, 1900.

OPINION BY JUDGE GEORGE M. HARRISON.

The appellant being the holder of fifty-eight shares of the capital stock of the Eastern Building and Loan Association, applied for and obtained from said association an advance or loan upon his stock of $5,800. As security for this loan the stock was pledged as collateral, and a deed of trust given by appellant, upon certain real estate. This deed secures the payment of $6,849.34, evidenced by seventy-six promissory notes of even date with the deed, each for the sum of $91.84, except the three maturing last, which are for $48.34 each, all payable to the association at its home office in Syracuse, N. Y., and falling due, one, on the last Saturday of each succeeding month, until all are paid, being the dues on the stock and the interest and premium on the loan. The appellant paid the notes as they fell due down to and including that due on the last Saturday in November, 1898, when the payments ceased, leaving unpaid several of the notes. In December, 1898, the appellant instituted this suit praying that the contract be rescinded; that the defendant association be enjoined from collecting any further sums by reason of the

transaction; that it be compelled to cancel and deliver to appellant the five notes remaining unpaid; to cancel and destroy the certificates of stock; to wholly release and cancel the deed of trust, and repay to appellant the sum of $1,069.60, which represented the amount paid to the association in excess of the loan and six per cent. interest.

Conceding that the demurrer to the bill was properly overruled, and proceeding at once to the merits of the case, we will consider, in the order stated in the petition for appeal, the grounds therein alleged in support of appellant's right to the relief asked.

It is contended that the parties entered into a definite contract, whereby it was agreed that the entire debt should be discharged and paid off in seventy-eight monthly installments; that if this agreement was a mistake on the part of the association, such a mistake releases the appellant, and entitles him to a rescission of the contract upon repayment by him of the money which he received, with six per cent. interest thereon. And that if the association is released from the agreement, because it had no power to make such a contract, the appellant is also released and entitled to a restoration of the *status quo*.

It is not denied that the contract in question was a New York contract, and to be construed in accordance with the laws of that State.

We are unable to distinguish this case, in principle, from the case of Building Association *v.* Tinsley, 96 Va., 322. In that case, the loan was for a definite fixed period of eight years, the borrower undertaking to pay the interest and premiuns thereon in monthly installments; this he did for more than four years, when he ceased paying, and brought suit seeking to be released from his contract upon the ground that the loan was usurious. Following the decision of the Supreme Court of New York, in the case of O'Malley *v.* Building Association, we held that the association did not possess the power to issue a certificate specifying a

fixed period for the maturity of its stock, and that such a clause in the certificate should be construed as an estimated period of maturity; that if the borrowing member had complied with all the rules and regulations of the association, and fully kept his contract during the entire eight years, in which it was estimated that his stock would mature, and had then demanded payment, *he would only have been entitled to receive what his stock had then earned.*

The terms and conditions expressed in the certificates of stock, in connection with the application for membership, and the by-laws of the association form the contract between the association and each shareholder therein. The deed of trust given by appellant expressly provides that the loan in question was made pursuant to and accepted under the provisions of the by-laws which were thereby made a part of the contract, and appellant further covenanted and agreed therein that he would keep and perform all promises and engagements made and entered into with the association according to the true intent and meaning of its by-laws and articles of incorporation.

The contention of appellant throughout is based upon the theory that he is an ordinary borrower of money, ignoring the fact that he is a member of a mutual association, into which he has voluntarily entered, and bound by its articles and by-laws, which constitute part of his contract, and must therefore be given their proper effect in construing that contract. The members of the association have united together in a business venture for the common benefit. It is a mutual association and equality of right according to the interest of each member is the fundamental idea upon which it rests. The definite contract was made doubtless in good faith by both parties, but appellant had no legal right to rely upon such a consummation, he was taking chances with his fellow shareholders that the earnings would be sufficient, in the time specified, to declare, not his alone, but all

the stock matured. At the end of the seventy-eight months, if the stock had not matured, each shareholder could receive what his stock had then earned, or he could go on paying until it did mature. Appellant occupied no better or different position, as a borrower, than the mere holder of stock. He remained a member of the association, the money advanced being upon his stock at its maturity or par value. He had fifty-eight shares and was advanced $5,800. It was never contemplated that he should return the $5,800, but it was the intention and purpose of the contract, that he should continue to pay the dues on his shares, and the interest and premium on the advance, until his stock was matured which would cancel the $5,800.

If the contention of the appellant should prevail it would be at the expense of his fellow stockholders, and if each stockholder should demand settlement upon a like basis, it would thwart the scheme and purpose of the association and probably bankrupt it.

It is further contended that appellant is entitled to a rescission of his contract upon the ground that he was induced to become a purchaser of the stock, as a basis of the loan or advance subsequently secured, by fraudulent misrepresentations made by the agents of the association, as to the time when the stock would mature; that but for such representations of material existing facts, he would not have purchased the stock.

As we have already seen, the association itself had no power to guarantee that the stock would be matured in a fixed time, and therefore its agents could not, if they had attempted to do so, bind it by such representations or guarantees. And further, the agents had no power or authority to bind the association by the statements or representations relied on, for the reason that the certificate of stock, the terms of which appellant must be presumed to have known, as well as the by-laws, and the printed literature, which was in the hands of appellant, all expressly provided that no agent had authority to

change the contract in any way, and that the association assumed no obligation for any statements not contained in its printed literature.

A misrepresentation, the falsity of which will afford a ground of action for damages, or a bill for the rescission of a contract, must be as to an existing fact. It must be an affirmative statement of some fact, in contradistinction to a mere expression of opinion, which is ordinarily not presumed to deceive or mislead (Watkins *v.* Wytheville, &c., Co., 92 Va., 1: Max Meadows, &c., Co. *v.* Brady, *Id.*, 71). So far as the representations made in the printed literature are concerned, for reasons already stated, these are not sufficient to entitle appellant to rescind the contract. As to the representations touching the business of the company, they were merely to the effect that judging from its success in the past (it had only been in business a few months), the business would continue to grow to such an extent that the association would be able to fulfill its promise to close up the contract within seventy-eight months. There was no representation of a definite rate of earnings made by the company, upon which any calculation could be made to test the accuracy of this statement. It was the opinion of the agent, based upon speculations and business contingencies running far into the future, that the end desired by all would be realized. They were not affirmative statements of an existing fact such as the law requires, to entitle appellant to the relief asked.

Apart, however, from these considerations it is too well settled to need citation of authority, that where a party intends to repudiate a contract on the ground of fraud, he should do so as soon as he discovers the fraud; for if after the discovery of the fraud he treats the contract as a subsisting contract, he will be deemed to have waived his right of repudiation, and must then bring an action for damages for the deceit. And whenever a party to a contract has a right to elect whether he will avoid it or treat it as a subsisting contract, his elec-

ion may be manifested by acts as well as by words, and, when once made, is final, and cannot be retracted (Max Meadows, &c., Co. *v.* Brady, *supra*). It appears from the record that in March, 1898, appellant was informed by an agent of the company that the stock would not be matured in the time specified, and that twenty-eight more monthly installments would be required; and shortly thereafter received from the company its annual report, giving him the same information; whereupon he wrote to the company for a statement of what he owed under his contract; and received in reply a statement showing his indebtedness, based upon the additional monthly payments necessary to mature the stock. Notwithstanding all this clear and authoritative information on the subject, he took no action, but continued to pay his monthly installments until the following November, thus making nine several payments after full knowledge of the facts now relied on as ground for rescission. This was a ratification of the right to demand the additional installments that disentitles appellant to the relief now sought. He says he continued to make the payments, because he thought that, in any event, he would have to perform the obligation into which he had entered; and yet in his bill he asks that $1,069.60, a sum more than sufficient to cover the payments thus made, be refunded to him.

The final contention of appellant is that, if he was under an obligation to continue his payments beyond the seventy-six notes given by him for dues, premium and interest, then the contract is an indefinite one, and void for uncertainty. This position has been sufficiently answered by what has been already said. The company had no power to make anything but an indefinite contract, so far as the time when its stock would mature was concerned. To hold the contract invalid for this reason, would be to hold that all subscriptions to the stock of a building association, when the time for the maturity of the stock was not certain and fixed,

were invalid, whereas the contrary is the settled law governing in the construction of such contracts.

The learned counsel for appellant has commented in strong terms upon the harshness of the contract in question; so long, however, as such associations are permitted to do business in the State, and persons are found willing to embark in the enterprise, by becoming shareholders therein, the courts have no alternative but to enforce the contracts they are authorized to make.

For these reasons the decree appealed from is affirmed.

(A copy teste.)

GEO. K. TAYLOR,
C. C.

Supreme Court of the United States.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y., Plaintiff in Error, vs. DAVID W. EBAUGH, Defendant in Error.	October Term, 1900. No. 453. General Docket No. 17,938.

Comes said plaintiff in error and moves this Honorable Court to advance this cause upon the docket and hear it together with or on the same day as the case of the Eastern Building and Loan Association of Syracuse, N. Y., plaintiff in error, against Lawrence S. Welling and Marion Bonnoit, defendants in error, which is No. 190 of the calendar of the October Term, 1900, and No. 17,620 on the General Docket, and in support of said motion shows cause as follows:

I.

The Eastern Building and Loan Association of Syracuse, N.Y., is plaintiff in error in each case and is represented in each by the same counsel (Ebaugh Transcript, p. 70, fol. 105; p. 74, fol. 113; Welling & Bonnoit Transcript, p. 109, fol. 205; p. 113, fol. 215). The defendants in error in each case are members of and stockholders in said plaintiff in error (Ebaugh Transcript, p. 2, fol. 2; p. 6, fol. 8; p. 13, fols. 18, 19; Welling & Bonnoit Transcript, p. 5, fols. 8, 9; p. 10, fol. 18).

II.

Both cases are brought by writs of error to this Court from the Supreme Court of South Carolina (Ebaugh Transcript, p. 69, fols. 103, 104; Welling & Bennoit Transcript, p. 115, fols. 219, 220).

III.

The questions involved in each case, both of law and fact, are in several respects identical. In each case the certificates of stock of the Eastern Building and Loan Association held by the defendants in error were identical as to terms and provisions, especially in stating that the stock would mature in seventy-eight months from the date thereof (Ebaugh Transcript, pp. 10, 12, fols. 14, 17; Welling & Bennoit Transcript, pp. 47, 49, fols. 86, 90).

The defendant in error Ebaugh is suing to recover the maturity value of his stock under aforesaid provision in his stock certificate stating that the stock would mature in seventy-eight months (Ebaugh Transcript, pp. 2, 4, fols. 1, 5). The defendants in error Welling & Bennoit obtained a loan or advance of the maturity value of their stock by pledging their stock to the Association, giving as collateral security therefor a mortgage, the amount due thereunder being evidenced and secured by seventy-eight promissory notes. Said Welling & Bennoit, having paid said notes, claimed that the mortgage had been paid in full and sued to recover a penalty from the Eastern Building and Loan Association provided for by statute for a failure to satisfy said mortgages of record (Welling & Bennoit Transcript, pp. 2, 6, fols. 3, 12; pp. 7, 11, fols. 12, 20). In each case the defendants in error base their right of action upon the proposition that the statement of the time of maturity of the stock was a valid agreement upon the part of the plaintiff in error to pay the said maturity value of the stock at the end of 78 months from the date thereof. (Ebaugh Transcript, pp. 2–4, fols. 2–5; Welling &

Bonnoitt Transcript, pp. 2–4, fols. 3–7); In each case the Supreme Court of South Carolina held that the provision that the stock would so mature was a valid contract and binding upon the Association. (Ebaugh Transcript, pp. 67, 68, fols. 99–101; Welling & Bonnoit Transcript, pp. 97–101, fols. 183, 188).

By the laws and decisions of the State of New York upon which plaintiff in error relied and in which State the plaintiff in error is incorporated and has its principal office, the fixing of the time of maturity of stock in a building and loan association is merely an estimate upon the part of the Association of the time when its stock will mature. And any other construction of the contract between the Association and its members and stockholders, and of the terms of the stock certificates would make the contract of membership and the conditions of the stock certificates *ultra vires* of the Association, and void (Ebaugh Transcript, p. 2, fol. 2; p. 15, fol. 21; pp. 38–41, fols. 55–60; Welling & Bonnoit Transcript, p. 2, fol. 4; pp. 74–87, fols. 138–164).

In each case the contention of the plaintiff in error is that the Supreme Court of South Carolina should have determined and construed the rights of the defendants in error as members of and stockholders in the plaintiff in error under and pursuant to the laws and decisions of the State of New York. This it did not do, and so failing to do, plaintiff in error contends that it refused to give full faith and credit to the public acts, records and judicial proceedings of the State of New York and impaired the obligations of the contract between the plaintiff and defendants in error and denied to plaintiff in error the equal protection of the laws (Ebaugh Transcript, pp. 74, 76, fols. 113–117; Welling & Bonnoit Transcript, pp. 113–115, fols. 214–218).

IV.

Following is an abstract of the assignments of error in each case, which are placed in parallel columns

for the purpose of facilitating the comparison thereof:

Assignments of Error in the Ebaugh Case.	Assignments of Error in the Welling and Bonnoit Case.
1. The Supreme Court of South Carolina erred in refusing to give full faith and credit to the public acts, records and judicial proceedings of New York. Ebaugh Transcript, p. 84, § 1.	1. The Supreme Court of South Carolina refused to give full faith and credit to the public acts, records and judicial proceedings of New York. Welling and Bonnoit Transcript, p. 113, § 1; p. 115, § 7.
2. Said Court erred in upholding a rule of law established by the Courts of South Carolina which impaired the obligation of the contract in suit and deprived plaintiff in error of its property without due process of law. Ebaugh Transcript, p. 85, § 4.	2. The said Court erred in establishing a rule of law impairing the obligation of the contract between the parties hereto. Welling and Bonnoit Transcript, p. 115, § 7.
3. The Federal questions were saved by the exceptions, and the Court should have determined the contract relations between the parties in accordance with the articles of the Association, by-laws, stock certificate, application for membership and the laws and decisions of New York. Ebaugh Transcript, p. 86, § 9.	3. The Court erred in refusing to pass on the contract obligations of defendant in error entered into in New York and pursuant to the laws and decisions thereof. Welling and Bonnoit Transcript, p. 114, § 2.

4. Said Court erred in holding that the laws of New York did not forbid plaintiff in error from entering into a definite agreement that its stock would mature in 78 months.

Ebaugh Transcript, p. 85 § 7.

Said Court erred in holding plaintiff in error, a corporation organized under Chapter 122 of the Laws of 1851, of New York, was bound by an *ultra vires* agreement and could not be held to question or deny its liability therefor.

Ebaugh Transcript, p. 85, § 6, § 8.

4. Said Court erred in holding that the laws of New York were not binding upon the courts of South Carolina and did not enter into, govern and control the construction of the mortgage in suit. The defendants in error being members of and stockholders in plaintiff in error.

Welling and Bonnoit Transcript, p. 114, § 4.

Said Court erred in holding that the mortgage in suit was discharged and paid and thereby refused to give full faith and credit to the public acts, records and judicial proceedings of New York and impaired the obligation of the contract between the parties hereto.

Welling and Bonnoit Transcript, p. 114, §5.

5. Said Court erred in not determining the rights of defendant in error under the laws and decisions of New York.

Ebaugh Transcript, p. 85, § 6.

5. Said Court erred in changing the construction of Sections 1894 and 1895 of the revised statutes of South Carolina of 1893, and in applying them to a case where the payment and discharge of the mortgage was controverted and denied, said mortgage being only an element or incident in

the contract between the parties, said contract arising under and being controlled by the laws and decisions of New York.

Welling and Bonnoit Transcript, p. 114, § 6.

6. Said Court erred in holding that the decisions of the Courts of New York were not in conflict with its own construction of the contract in suit.

Ebaugh Transcript, p. 85, § 5.

6. Said Court erred in holding and deciding that " whatever may be the laws of New York we do not think they should be enforced in this State."

Welling and Bonnoit Transcript, p. 115, § 8.

Said Court erred in holding the law of New York to be (and conclusive in this case) that when a corporation enters into an *ultra vires* contract, it is bound thereby if it permits the other party to perform his agreement and receives the benefits and retains them.

7. Said Court erred in placing the same construction on the contract in suit as was placed on the contracts in certain cases cited in the opinion of the Court.

Ebaugh Transcript, p. 84, §2; p. 84, § 4.

7. Said Court erred in the application and in changing the settled construction of Sections 1894 and 1895 of the Revised Statutes of South Carolina of 1893.

Welling and Bonnoit Transcript, p. 114, § 6.

V.

On the 21st day of January, 1901, counsel for the defendant in error Ebaugh submitted a motion made in behalf of the said defendant in error, praying for the dismissal of the writ of error herein, or the affirmance of the judgment of the Court below in this cause; and said motion having been duly considered this Honorable Court decided to render no decision thereon at once, but to continue said motion until the final hearing herein upon the merits, and to decide the same upon such hearing.

VI.

The said case of Welling and Bonnoit presents the question of the contract relations between plaintiff in error and its borrowing or advanced stockholders or members, in so far as such contract relations involve the maturity of stock and the discharge of mortgages at a fixed stock maturity period, while the said Ebaugh case presents the converse of said proposition, namely, the right of non-borrowing and non-advanced members to recover the par value of their stock without regard to its actual maturity at the estimated maturity period, and the federal questions arising upon and presented by the records in the two cases are identical.

VII.

A stipulation entered into by the respective counsel of the parties to this cause and agreeing to the advancement of same is hereto annexed as a part of the motion papers herein.

In view of the similar character of these two causes, as shown by the foregoing statement, and in view of the motion now pending in this cause, your petitioner prays that the motion to advance this cause and hear same, together with or on the same day as the cause of Eastern Building and Loan Association, of Syracuse, New York, plaintiff in

error, against Lawrence S. Welling and Marion Bonnoit, defendants in error, be granted.

Respectfully submitted,

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, NEW YORK,
Plaintiff in Error.

By
WILLIAM HEPBURN RUSSELL and
WILLIAM BEVERLY WINSLOW,
Its Attorneys.

D. A. PIERCE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y.,
Plaintiff in Error,

vs.

DAVID W. EBAUGH,
Defendant in Error.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled cause that said cause may be advanced upon the calendar and argued and heard upon the same day as the cause of Eastern Building and Loan Association of Syracuse, New York, plaintiff in error, against Lawrence S. Welling and Marion Bennoit, defendants in error, which latter cause is number 190 upon the calendar of the October Term, 1900, and number 17,620 upon the general docket.

IT IS ALSO AGREED that such order as may be necessary, and as the Court may deem proper, shall be entered upon this stipulation.

Dated February 9th, 1901.

WM. HEPBURN RUSSELL,
WM. BEVERLY WINSLOW,
Attys. for Plaintiff in Error.

W. H. LYLES,
H. J. HAYNESWORTH,
L. O. PATTERSON,
Attys. for Defendant in Error.

To WILLIAM H. LYLES,
H. J. HAYNESWORTH and
L. O. PATTERSON,
Attorneys for Defendant in Error Ebaugh.

To HENRY A. M. SMITH,
Attorney for Defendants in Error Welling and Bennoit.

You are hereby notified that the plaintiff in error in the above entitled cause will, on Monday the 4th day of March, 1901, on the meeting of the Supreme Court of the United States, in the City of Washington, District of Columbia, on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the Court the foregoing motion.

WILLIAM HEPBURN RUSSELL and
WILLIAM BEVERLY WINSLOW,
Attys. for Plaintiff in Error.
Office and Post Office address,
253 Broadway,
New York City, N. Y.

EVENING POST JOB PRINTING HOUSE, NEW YORK.

STATE OF NEW YORK, } ss.: 1
County of New York, }

JOHN E. RUSTON, being duly sworn, deposes and says, that he is an attorney and counsellor at law of the State of New York, and is associated with Messrs. William Hepburn Russell and William Beverly Winslow, the attorneys for the plaintiff in error in the above entitled action.

Deponent further states that due and timely service of the foregoing notice of motion for the advancement of the foregoing cause so that it may be heard together with, or on the same day as the case of Eastern Building and Loan Association against Welling & Bonnoit, and due and timely service of the argument and of all papers upon said motion was made upon William H. Lyles, H. J. Haynsworth and L. O. Patterson, attorneys for defendant in error Ebaugh, and Henry A. M. Smith, attorney for defendants in error Welling & Bonnoit. Said service was made on the 9th day of February, 1901, by mailing in a sealed and post-paid envelope a typewritten copy of said papers to the addresses of said attorneys, to-wit: to William H. Lysles, H. J. Haynsworth and L. O. Patterson in the name of Haynsworth, Parker & Patterson, at Greenville, S. C., and to said Henry A. M. Smith, in the name of Mitchell & Smith, at Charleston, S. C. Said Mitchell & Smith acknowledged receipt of same by letter, dated February 11th, 1901, a copy of which is as follows: 2 3

"Messrs. RUSSELL & WINSLOW,
253 Broadway,
New York City.

DEAR SIRS:

We beg to acknowledge receipt from you to-day of the following typewritten papers, in the case of

4 the Eastern Building and Loan Association of Syracuse, Plaintiff in Error, *vs.* David W. Ebaugh, Defendant in Error, in the Supreme Court of the United States, No. 453, October Term, 1900—

1st. Argument and motion to advance said cause and have it heard together with the cause of the Eastern Building & Loan Association of Syracuse *vs.* Welling and Bennoit.

2nd. Unsigned stipulation between counsel in the case of Eastern Building & Loan Ass'n *vs.* David W. Ebaugh to such advancement and hearing together.

5 3rd. Notice that the above motion will be submitted to the Court on Monday, the 4th of March, 1901.

Yours very truly,
(Signed) MITCHELL & SMITH.

P. S.—The above typewritten papers to be regarded as printed."

The attorneys for the defendant in error Ebaugh have consented to the advancement of this cause, and will not oppose said motion.

Deponent further states that on the 14th day of February, 1901, service was made of the printed
6 copy of aforesaid papers by mailing same in a sealed and post-paid envelope to aforesaid attorneys at their respective addresses as aforesaid.

JOHN E. RUSTON.

Sworn to before me this 18th day of February, 1901.

WILLIAM H. MAGINNIS,
Notary Public,
N. Y. Co.

{NOTARY'S SEAL.}

Supreme Court of the United States.

OCTOBER TERM, 1901.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y., Plaintiff in Error, vs. DAVID W. EBAUGH, Defendant in Error.	Term No. 177. In Error to the Supreme Court of the State of South Carolina.

STATEMENT, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

Statement of the Case.

The record in this case presents a controversy between a corporation of New York and one of its stockholders resident in South Carolina as to the *status* of the stockholder and the relative rights, duties and obligations of the corporation and its stockholders as incident to and arising out of their contracts of membership. No contract entered into or to be performed in South Carolina is in controversy. The only contest is over the contract of membership entered into in the State of New York, performable in that State, and of which the laws of New York and the corporate articles and by-laws are necessarily constituent parts. The sole issue is

between the defendant in error, Ebaugh, and the plaintiff in error, Eastern Building and Loan Association, upon the question whether the defendant in error (plaintiff below) is entitled to withdraw his contributions as a stockholder to the capital stock of the corporation, and, in addition to such contributions, to recover a considerable sum representing the difference between the amount paid in on the member's stock and its par value. The record shows by the undisputed evidence, as we shall see later, that the stock of the defendant in error has not attained its maturity or par value, and that plaintiff in error is not liable, under the statutes and judicial decisions of New York, and the express terms of the articles of association and by-laws of the corporation, to pay to defendant in error the par value of his stock. He, however, insists that he is entitled to recover the full par value of his stock, notwithstanding the fact that the Eastern Building and Loan Association is a purely mutual corporation of which he is a member, having like obligations with all other members, and notwithstanding the undisputed fact that the assets of the corporation are not sufficient to enable it to pay to members the full par value of their stock at the expiration of 78 months from the date of membership, as originally contemplated and estimated. There can be no successful or even plausible contention that under the laws of New York and the corporate articles and by-laws, defendant in error is entitled to recover the par value of his stock. At most he can only recover the amount actually contributed by him to the capital stock of the corporation, plus his proportionate share of the corporate profits, if any. Even this right, under the laws of New York, is an *inchoate* one, only to be exercised upon certain terms and conditions set forth in the statutes of New York and in the corporate articles and by-laws (Englehardt *v.* Fifth Ward Assn., 148 N. Y., 281).

The Supreme Court of South Carolina having in the case of *Welling and Bonnoitt* v. *Eastern Build-*

ing and Loan Association, 56 S. C., 280, 296, 297, declared that South Carolina is "not compelled from mere comity to recognize the laws of New York," and that "whatever may be the laws of New York we do not think they should be enforced in this State," follows the same doctrine in the case at bar, and holds as between a stockholder of the Eastern Building and Loan Association resident in South Carolina and the New York corporation, that the laws of New York are not to be applied as a part of the contract of corporate membership even though they are fully proven as facts in the case, but that full faith and credit may be denied to such laws, and the obligations of the corporation to its members be determined without reference to the laws of the corporate *situs*.

We meet this decision by invoking those provisions of the Constitution of the United States which declare that "full faith and credit *shall* be given in each State to the *public acts*, records and judicial proceedings of every other State" (Const., Art. IV., § 1); that no State shall "pass * * * any law impairing the obligation of contracts" (Const., Art. I., § 10), and that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction *the equal protection of the laws*" (Const., XIVth Amendment, § 1).

The defendant in error at the last term made a motion to "dismiss or affirm." That motion, by order of the Court, was continued until the hearing upon the merits. In support of the motion, counsel for defendant in error submitted an "abstract of the case" or a "history of this case" which we cannot accept as either fair or accurate in its presentation of the matters in controversy. We therefore make the following detailed statement of the facts as we find them in the record.

Facts Shown by the Record.

I.—Plaintiff in error (defendant below) is a corporation organized under the laws of the State of New York, with its principal place of business in Syracuse, New York.

Transcript, p. 2.

II.—It was incorporated under Chapter 122 of the Laws of New York of 1851, as amended by Chapter 564 of the Laws of New York of 1875, and both of these laws were given in evidence, and appear in the record in this case.

Transcript, pp. 31–38.

III.—The corporate charter or articles of incorporation were given in evidence, and appear in the record.

Transcript, pp. 47–53.

IV.—The by-laws of the corporation were also given in evidence, and appear in the record.

Transcript, pp. 54–62.

V.—The case of *O'Malley* v. *People's Building & Loan Association*, reported in 92 Hun (N. Y.), 572, was also formally given in evidence in behalf of the corporation.

Transcript, pp. 38–41.

VI.—D. A. Pierce, a witness called in behalf of the corporation, qualified himself as an expert to testify to the laws of the State of New York, showed his special familarity with the laws of that State applicable to building and loan associations, specifically testified that the Laws of 1851 and 1875, aforesaid, were the governing acts under which plaintiff in error was incorporated, and then testifies that "under the statute under which defendant corporation is incorporated and the defendant's articles of incorporation and by-laws and the decisions of

the courts of the State of New York, the defendant is not bound to mature its stock within the time specified, if any, on the face of the certificates, say 78 months, or any other fixed period, regardless of the actual value of said stock at the expiration of said fixed period, said value depending, of course, upon the payment of dues made thereon and their *pro rata* share of the earnings; that any period of maturity fixed or indicated in the certificates of stock in any way is simply an estimated period, and that the association is not required to pay the face value thereof at the expiration of any such period, unless the amount paid in thereon together with the earnings apportioned thereto shall equal the par value of the shares."

Transcript, pp. 41, 42.

VII.—It was also agreed upon the trial "that the New York Reports can be referred to and the decisions shall be considered parts of the case."

Transcript, p. 16.

VIII.—Under this stipulation, counsel for the corporation gave in evidence the cases of *Englehardt* v. *Fifth Ward Dime Savings Assn.*, reported 148 N. Y., 281; *People* v. *Lowe*, reported 117 N. Y., 175; *Concordia Savings, &c., Assn.* v. *Read*, reported 93 N. Y., 474; and thereupon defendant in error (plaintiff below) introduced under said agreement of counsel the cases of *Whitney* v. *Barlow*, reported 63 N. Y., 62; *DeGraff* v. *American Linen Thread Co.*, reported 21 N. Y., 124; and *Diamond Match Co.* v. *Roeber*, reported 106 N. Y., 473.

IX.—Upon the trial "the Referee was requested by defendant's attorney to give full faith and credit to the laws of New York under Article IV., § 1 of the United States Constitution and under § 905 of the Revised Statutes of the United States."

Transcript, p. 16.

X.—The case was heard in the trial Court before a referee. The report of the Referee was against the corporation (Transcript, pp. 24–28) and the Referee in his findings expressly refused to be bound by and give effect to the statutes and judicial decisions of the State of New York, in accordance with the terms of those statutes and the meaning and effect of those decisions in the State of New York.

Transcript, pp. 26, 27, 28.

The report of the Referee was excepted to by counsel for the corporation upon numerous grounds, among others, "That the Referee erred in not giving full faith and credit to the laws of New York, under Article IV., § 1 of the Constitution of the United States and under § 905 of the Revised Statutes of the United States."

Transcript, pp. 29, 30, Finding XII.

The report of the Referee was confirmed and judgment rendered thereon in the Court of Common Pleas for the County of Greenville, the exceptions to the Referee's report being overruled and judgment rendered against the plaintiff in error, the Judge of that Court holding that the decisions of the Supreme Court of South Carolina in the cases of *Williamson* v. *Eastern Building and Loan Association* and *Welling and Bennoitt* v. *Eastern Building and Loan Association*, previously decided by the Supreme Court of South Carolina, were controlling upon the questions involved.

Transcript, pp. 62–65.

XII.—Exceptions to the decision and judgment of the Court of Common Pleas were duly taken, and what seem to be several distinct "federal questions" were raised by these exceptions.

Transcript, p. 65; Exceptions, 1, 2, 3, 4, 5.

XIII.—Upon these exceptions on appeal the case was heard and determined in the Supreme Court of South Carolina and the judgment of the lower Court "affirmed."

Transcript, pp. 66, 68.

XIV.—In the case of *Welling and Bennoitt* v. *Eastern Building and Loan Association*, 56 S. C., 280, the Supreme Court of South Carolina, in its opinion in that case, laid down the following proposition of law: "The appellant, however, contends that the said agreement and the by-laws are to be construed under the laws of New York. * * * This is not a right of either State, but is permitted and accepted by the States for mutual interest and convenience, from a sense of the inconvenience which would otherwise result, and from a moral necessity to do justice in order that justice may be done in return. Without this rule the law of one State can have no force in another. But there is no comity among the Courts of the different States. * * * It is the duty of every State to look to the interests of its own subjects. Comity being voluntary and not obligatory, cannot supersede all discretion on the subject. * * * No State can demand the recognition of its laws in another, if they are deemed by the latter to be impolitic or unjust, of bad morals, or injurious to the rights of its citizens, or against its public policy. * * * It thus appears that the State is not compelled from mere comity to recognize the laws of New York for the reasons stated. The agreement herein is, in our opinion, injurious to the interests of our people, *and whatever may be the laws of New York, we do not think they should be enforced in this State.*"

56 S. C., 280, 296, 297.

XV.—In the case at bar, the Supreme Court of South Carolina, following the reasoning in the *Welling and Bonnoitt* case, and citing that case as a controlling precedent, affirmed the judgment of the

lower court, but, the *Welling and Bonnoitt* case having in the meantime been brought by writ of error in this court, the transcript in that case having been filed in the office of the Clerk of this Court on January 27, 1900 (Transcript of Record in case of Welling and Bonnoitt, No. 17,620, Term No. 190, p. 117), the Supreme Court of South Carolina, in its opinion in the case at bar, while following literally the doctrine laid down in the *Welling and Bonnoitt* case, yet seeks to make it appear that its opinion and decision is in conformity with the laws and decisions of the State of New York, and that it has construed the charter powers, duties and obligations of plaintiff in error and the contract of membership between plaintiff in error and defendant in error in accordance with the laws of New York. Says the Supreme Court of South Carolina in its opinion: "Both the Master and Circuit Judge find, *as matter of fact*, that the laws of New York do not forbid the defendant from entering into an agreement by which his shares of stock would mature in a definite time."

Transcript, p. 67.

It is then sought to rest the decision in this case solely upon the proposition that plaintiff in error could not escape liability to defendant in error upon the ground that it had entered into a contract or agreement "in excess of its charter powers or * * * unauthorized by law" (Transcript, pp. 67, 68), thus ignoring the fact that *this is not the question presented by the record in this case at all* and is a mere side issue imported into the case for the purpose of trying to avoid determining the membership obligations of defendant in error *as a stockholder* in plaintiff in error under and in accordance with the corporate charter and by-laws and the laws and judicial decisions of the State of New York.

Closing its opinion in this case, the Supreme Court of South Carolina says: "As the laws of New York are not in conflict with the construction which

this Court has placed upon contracts similar to that upon which the action herein is founded, we fail to discover any facts causing us to differentiate this case from those hereinbefore mentioned."

Transcript, p. 68.

XVI.—The first "federal question" presented in this case is whether defendant in error as a stockholder in plaintiff in error was entitled, in an action brought by him, as a stockholder, to recover from plaintiff in error the amount of his contributions to the capital stock of plaintiff in error, to have his rights and claims adjudicated and determined under the laws of South Carolina without regard to the articles of incorporation and by-laws, and statutes and decisions of the State of New York, or whether plaintiff in error was entitled, upon the trial of such action, to have full faith and credit accorded by the courts of South Carolina to the statutes and judicial decisions of the State of New York, *with the right to have the same effect given to the statutes of New York and the articles of incorporation and by-laws of the plaintiff in error that had been and would be given to such laws, articles of incorporation and by-laws in the State of New York by the courts of New York.* The denial of this right to plaintiff in error is manifest upon the face of the record in this case. as the following further statement will show.

XVII.—Defendant in error, as plaintiff below, brought his action upon a stock certificate of the Eastern Building and Loan Association, alleging himself to be a shareholder, and that for a period of 78 months he had made payments of dues or calls upon his stock to the association. He further alleged that under his contract of membership he was entitled, after the payment of 78 monthly installments of seventy-five cents each upon each share of the stock subscribed for by him, to have such stock redeemed by the association at its full par or ma-

turity value of $100 per share. He alleged the making of the stated number of payments and the failure of the association to pay him the par or maturity value of his stock. He did not allege that the stock had been fully paid or was matured.

Transcript, pp. 2–4.

XVIII.—Plaintiff in error (defendant below) answered, admitting that plaintiff below was a stockholder, but pleading specifically that his stock had not attained its par or maturity value, was not fully paid, and that under its articles of incorporation and by-laws and the laws of the State of New York it had no right, power or authority to make payment to the said plaintiff of the par value of his said stock or to pay to him anything more "than the sum paid in by him on said stock, plus the accumulated profits thereon less the *pro rata* share of expenses and losses of defendant corporation properly chargeable against said stock pursuant to its articles of incorporation and its by-laws, not inconsistent with said articles and said laws of the State of New York."

It was further alleged in the answer, "That any provision in the certificate of stock issued by the defendant corporation to the plaintiff that the shares of stock held by him purporting or pretending to guarantee the maturity value thereof at any fixed time or period, without regard to the earnings and profits of the defendant corporation and the equal *pro rata* distribution of profits, losses and expenses of the defendant corporation among its stockholders is a contract or attempted contract *ultra vires* of the corporation, wholly beyond its corporate powers, in contravention of its articles of incorporation, by-laws and the laws of the State of New York by which it is governed, and unenforcible against it, *but that there is any such guarantee or agreement to pay is denied, and on the contrary it is alleged that in contemplation of law the promise to pay plaintiff's stock at its calculated maturity in 78 months*

was a mere estimate and not a guaranty that it would mature in that time from its share of earnings of the defendant corporation, plus the payments required thereon from the plaintiff."

It was further alleged in the answer that "at the time of the commencement of this action said shares of stock had not matured and become worth the sum of $100 per share, and that said stock has not yet matured and become worth $100 per share from the amount paid in thereon by the plaintiff together with the full proportion of earnings of the defendant to which the same is entitled less the *pro rata* share of expenses and losses of the defendant association properly chargeable against said stock."

There were various other specific defenses interposed in the answer not necessary to mention so far as the present discussion is concerned.

Transcript, pp. 4–9, pars. 6, 7, 8, 9.

It will be seen from the foregoing that the real defense of the association upon which it relied was found in the fact that under its articles of incorporation and by-laws and the laws of the State of New York, it had no power to *guarantee* the maturity of its stock at a fixed or definite time, and also that under those laws and the decisions of the courts of New York construing such laws, the so-called guaranty of maturity was in fact only an estimate as to the time when the maturity of the stock would be attained, it being manifest from a simple arithmetical calculation that payments of seventy-five cents per share per month for a period of 78 months would not equal the par value of the stock at $100 per share, and, therefore, that if it was to attain its maturity value at the expiration of the 78 months period, it would have to be through its participation in the earnings or profits of the corporation.

Transcript, p. 42, Deposition D. A. Pierce, and p. 44, Deposition Nathan C. Visscher.

It follows that before the courts of South Carolina could adjudge that defendant in error, as plaintiff below, was entitled to recover the amount of the par value of his stock certificates from the association, they were compelled to hold not merely that a contract *ultra vires* of a corporation could be enforced against it under the laws of New York and of South Carolina, but, also, and this is where the first federal question specifically arises, that they would not enforce and give full faith and credit to the statutes of the State of New York under which the association was incorporated, to the decisions of the courts of New York applying those statutes and to the articles of association and by-laws of the corporation, under all of which it is the settled law of the State of New York that a stockholder in a New York building and loan association cannot recover from the association the par or maturity value of his stock until the same has actually reached its par or maturity value by payment of calls or dues thereon, together with accruing profits, and that any stipulations in the stock certificates or literature of the corporation indicating or attempting to fix an earlier or different maturity value, will be treated as mere estimates of maturity, not binding as contracts upon the corporation.

In the case at bar, the Supreme Court of South Carolina, while not in express words refusing to give full faith and credit to the laws of New York in this respect, does in fact, by its decision, refuse to do so, resting it upon the doctrine stated in the case of *Welling* v. *Association*, *supra*, namely, that "The agreement herein is in our opinion injurious to the interests of our people, and whatever may be the laws of New York, we do not think they should be enforced in this State."

56 S. C., 297.

XIX.—It appears from Chapter 122 of the Laws of New York of 1851, and from the articles of incorporation and by-laws of the corporation, that the plain-

tiff in error is a purely mutual corporation without any fixed capital, except the sums paid in by its stockholders or members, and that the rights and duties of all stockholders are equal, mutual and reciprocal.

Transcript, pp. 31-35, 47-53, 54-62.

XX.—Section 1 of Chapter 122 of the Laws of New York of 1851, after stating the objects for which corporations of the nature of plaintiff in error may be organized, specifically limits the time and the conditions upon which members shall be entitled to receive from the association the par value of their shares, namely, "when the funds of such association shall amount to a certain sum per share to be specified in the articles of association."

Transcript, p. 31.

Section 4 of the same act expressly authorizes the trustees or directors to require subscribers for stock to pay calls or dues thereon until the stock has been paid up to its par value, the clause in question reading as follows: "It shall be lawful for the trustees to call in and demand from the stockholders respectively all such sums by them subscribed at such time and in such payments or installments as the articles of association shall prescribe."

Transcript, p. 32.

The articles of incorporation of the plaintiff in error provide that "The entrance fee of new members and new shares shall be $1 per share of stock in said association. The monthly dues per share shall be seventy-five cents."

Transcript, pp. 49, 50; Articles of Incorporation, Par. IX.

Section 7 of the New York Act of 1851 reads as follows:

"Every such corporation shall terminate except for the purpose of settling its affairs, whenever all

the shares thereof shall be redeemed by advances thereon; or whenever the owners of unredeemed shares shall be paid the ultimate value thereof as provided in the articles of association and not sooner, but no dividend of principal or of profits shall be made until such termination; nor until all the debts of the association shall have been paid or otherwise sufficiently provided for. No holder of redeemed shares shall claim to be exempt from making the monthly payment provided in the articles of association, *upon the ground that by reason of losses, or otherwise, the association has continued longer than was originally anticipated, whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest thereon;* nor shall the imposition of fines for non-payment of dues or fees, or other violation of the articles of association, or of any premium for loans made to members, be deemed to be a violation of the provisions of any statute against usury."

Transcript, p. 32.

Section 11 of the Act of 1851 provides that "all shareholders of any association formed under this act shall be individually liable to the creditors of said association to an amount equal to the amount of stock held by them respectively for all debts contracted by such association."

Transcript, p. 33.

Section 2 of said Act of 1851 authorizes the corporations organized under its provisions in their articles of association to determine "the entrance fee of new members and new shares, the monthly or weekly dues per share, the redemption fee on shares on which advances shall be made, and the fees to be paid on the transfer of shares, the fines or penalties for non-payment of dues or fees, and other violation of the articles of association, the manner of redemption of shares by advances made thereon, the mortgage security to be taken on such advances

and how the same may be redeemed or changed, *the manner of transfer or withdrawal of shares*, the manner of investing funds not required for advances on shares, the qualification of voters at the meetings and the mode of voting (and) *the ultimate amount to be paid to the owners of unredeemed shares.*

Transcript, p. 31.

XXI.—The articles of association and by-laws contain no provision of any kind authorizing the payment to any stockholder of the par or maturity value of his stock at the expiration of 78 months from the date of its issue or at any other fixed or definite time. Article XII. does provide that shareholders upon certain conditions may withdraw their contributions to the capital stock of the corporation in advance of the maturity of the stock, but the gist of that provision is, that "upon such withdrawal the holder will be entitled to receive thereon the amount of the monthly installments that have been paid, with such additional interest, if any, as the by-laws may provide, *except that the same shall not exceed the net earnings of said stock.* * * * In no case shall a withdrawal from the loan fund exceed the amount of the installments paid thereto, together with the estimated amount of the earnings upon the same."

Transcript, p. 51; Articles of Incorporation, Par. XII.

Paragraph XV. of the articles of incorporation fixes the par or maturity value of shares at $100 per share.

Transcript, p. 52.

XXII.—Article XI. of the by-laws provides for an expense fund, and that "ten cents per share per month from the monthly payments on stock" shall be placed in this fund and be "devoted to the payment of operating expenses."

Transcript, p. 57; By-laws, Art. XI.

The by-laws further provide that "each share of stock shall be charged with any and all amounts that may be owing from the shareholder or his assigns to the Association, whether in dues, loans, fines, interest or premiums, and all certificates of stock in said association shall, whether mentioned therein or not, be subject to a lien thereon to secure any such indebtedness and the right to deduct and withhold the amount of any such indebtedness is hereby expressly reserved to the association."

Transcript, p. 60.

And they also provide that "all shareholders shall pay, or cause to be paid, a monthly installment of seventy-five cents on each share named in their certificate *until the same shall be fully paid.*"

Transcript, p. 60.

And they also provide that "if shares are withdrawn at any time before maturity, the holders thereof will be entitled to receive the amount paid into the loan fund in monthly payments," plus certain specified percentages of profit in certain cases.

Transcript, p. 60.

XXIII.—It is undisputed that the stock of the defendant in error had not reached its par or maturity value, and that his only right to claim the par value thereof from the association arises upon the provisions in the face of the certificate itself or from the literature of the company, which he claims the corporation is bound by in its relations with him as a stockholder, notwithstanding the provisions of the laws of the State of New York and the articles of incorporation and by-laws of the plaintiff in error. In this connection we direct attention to the fact that under Chapter 564 of the Laws of New York of 1875 the trustees or directors of plaintiff in error would render themselves personally liable by paying to defendant in error the par value of his stock before the maturity thereof, it being manifest

that they could only make such payment before the stock had matured out of the funds contributed by other members of the corporation.

XXIV.—Finally, and we regard this as conclusive upon this question, said Chapter 564 of the Laws of New York of 1875 provides that "No holder of redeemed shares shall claim to be exempt from making the monthly or other stated payments provided in the articles of association upon the ground that by reason of losses or otherwise the association has continued longer than was originally anticipated, whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest thereon."

Transcript, p. 36, Laws of New York, Chapter 564, § 7.

That defendant in error is estopped from charging the plaintiff in error with deceit or fraud in procuring his subscription for stock by representations as to the maturity of the stock in 78 months is shown by the following facts:

The association was not incorporated until February 22, 1890 (Transcript, p. 53). Hence it had never matured or paid any stock or demonstrated its earning capacity or rate of profits when Ebaugh's membership began.

He made a formal application for stock during 1892 (Transcript, p. 10) and his stock certificate was issued to him on April 1, 1892 (Transcript, pp. 10-12). He accepted such stock certificate and seems to have exercised all the rights of membership from that date up to the 17th day of January, 1899, when he instituted his action in the State court (Transcript, pp. 2-4).

It certainly must be true that if advanced or borrowing members can be required to continue making payments of dues upon their stock until the same actually reaches its par or maturity value,

even though the estimated period of maturity is exceeded, that non-borrowing or mere investing members cannot be permitted to withdraw the par value of their stock in excess of the amount paid in by them thereon at the expiration of the estimated period, and that such is the law of New York is settled by numerous decisions in that State and elsewhere.

Upon the foregoing state of facts, we submit that the following federal questions are raised in this case:

FIRST.—The Supreme Court of South Carolina has, by its decision, denied full faith and credit to the public acts and judicial proceedings of the State of New York.

SECOND.—It has, by its decision, denied to the plaintiff in error the equal protection of the laws of South Carolina in violation of the provisions of the XIVth Amendment to the Constitution of the United States.

THIRD.—It has, by its decision, deprived plaintiff in error of the fruits and benefits of its contract with the plaintiff in error, and denied to plaintiff in error that liberty of contract guaranteed by the Constitution of the United States and the XIVth Amendment thereto.

FOURTH.—It has, by its decision, invalidated, under the guise of construction, a contract that is in its nature a matter of inter-state commerce, and has thereby assumed jurisdiction over a question of commerce between the States in contravention of the provisions of the Constitution of the United States.

FIFTH.—It has, by its decision, changed and altered the settled rule of law established by prior decisions of the Supreme Court of South Carolina which were

the law of that State at the time the contract between the plaintiff in error and defendant in error was entered into, and thereby impaired the obligation of contracts in violation of the Constitution of the United States.

SIXTH.—It has, by its decision, deprived the plaintiff in error of its property without due process of law, in violation of the Constitution of the United States.

Upon these several federal questions, we insist that this Court has jurisdiction to review the judgment of the Supreme Court of South Carolina in this case, and, without repeating them here, we direct attention to the several assignments of error heretofore made in behalf of the plaintiff in error appearing in the record of this case.

Transcript, pp. 74–76.

This brings us to a discussion of the law of this case, first, upon the federal questions involved, and, second, upon the merits of the controversy between the parties as to the reciprocal rights, duties and obligations of the plaintiff in error as a corporation of New York, and the defendant in error, as a member of and stockholder therein. We therefore respectfully submit the following brief:

BRIEF.

I.

THE CONSTITUTION SUBSTITUTES FOR A MERE RULE OF COMITY A RULE OF CONSTITUTIONAL OBLIGATION BY PROVIDING THAT FULL FAITH AND CREDIT *Shall* BE GIVEN IN EACH STATE TO THE PUBLIC ACTS, RECORDS AND JUDICIAL PROCEEDINGS OF EVERY OTHER STATE, AND UNDER THIS CONSTITUTIONAL PROVISION THE SUPREME COURT OF SOUTH CAROLINA WAS REQUIRED TO GIVE TO THE STATUTES OF NEW YORK AND THE ARTICLES OF ASSOCIATION AND BY-LAWS OF THE EASTERN BUILDING AND LOAN ASSOCIATION MADE IN PURSUANCE OF THOSE STATUTES AND PROVEN AS FACTS CONSTITUTING AN INTEGRAL PART OF A NEW YORK CONTRACT, THE SAME FAITH, CREDIT AND EFFECT GIVEN TO THEM BY THE COURTS OF NEW YORK IN CONSTRUING LIKE CONTRACTS.

Const. U. S. Art. IV., § 1.
Cooley's Principles of Const. Law (2d ed.), 203.

The origin of this constitutional clause is clear, the reason for its existence manifest, and the history of its adoption brief and explicit.

It has long been a settled doctrine of private international law in England and all common law jurisdictions, that the laws of one country forming an integral part of a contract entered into and performable in such country, are to be treated as a part of the contract when it comes before the tribunals of another country for enforcement, and, when properly proven, given the same meaning and effect, the same faith and credit, that would be given them by the tribunals of the place of the contract.

Warrender *v.* Warrender, 9 Bligh., 115;
2 Cl. & F., 529, per Lord Brougham.
Bank of Augusta *v.* Earle, 13 Pet., 519.

Story: Conflict of Laws (8th ed.), pp. 36, 37, note (*a*).
Minor's Conflict of Laws, p. 5, § 4.
Robinson *v.* Queen, 87 Tenn., 445; 11 S. W. Rep., 38, 39.
Forepaugh *v.* Del., &c., R. Co., 128 Pa. St., 217; 5 L. R. A., 508, and note.
Fonseca *v.* Cunard S. Co., 153 Mass., 553.
Hilton *v.* Guyot, 159 U. S., 113.

"The first question to be considered is, what are the rules by which an English court ought to be governed in construing a foreign contract? Where a written contract is made in a foreign country, and in a foreign language, the Court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if it contains any); thirdly, evidence of any foreign law applicable to the case; *and fourthly, evidence of any peculiar rules of construction*, if any such rules exist, by the foreign law. With this assistance the Court must interpret the contract itself on ordinary principles of construction."

Lord Cranworth in Di Sora *v.* Phillipps and others, 10 H. of L., 624, 633.

"It may be laid down as the settled doctrine of public law that personal contracts are to have the same validity, interpretation and obligatory force in every other country which they have in the country where they were made."

2 Kent's Com., *458.
Cooper *v.* Waldegrave, 2 Beav., 282.
Thornton *v.* Dean, 19 So. Car., 583, 589.
Smith *v.* Elliott, 39 Tex., 202, 211.
Liverpool Steam Co. *v.* Phœnix Ins. Co., 129 U. S., 397, 448.

It will scarcely be denied that such was the doctrine of the English law at the time of the

American Revolution and when the "Articles of Confederation," and, subsequently, the "Constitution of the United States," were framed.

Robinson *v.* Bland, 1 W. Bl., 234, 256, 258.

Lloyd *v.* Guibert, 6 B. & S., 100.

Peninsular, etc., Co. *v.* Shand, 3 Moore, P. C. C. (N. S.), 272; 11 Jur. (N. S.), 771; 13 W. R., 1049; 12 L. T. (N. S.), 808.

Ellis *v.* McHenry, 23 L. T. (N. S.), 862; 6 L. R. C. P., 228; 40 L. J. C. P., 109; 19 W. R., 503.

Don *v.* Lippman, 5 C. & F., 1.

Huber *v.* Steiner, 2 Scott, 304; 2 Bing. N. C., 202; 1 Hodges, 206.

Ferguson *v.* Fyffe, 8 C. & F., 121.

In order to secure this faith and credit to foreign laws, it was only necessary in the courts of England to prove such laws as matters of fact, and by evidence to establish the construction and effect of such laws at the *situs* of the contract of which they formed a part.

Mostyn *v.* Fabrigas, Cowp., 174;

Crawford *v.* Witten, Lofft., 154; 1 Dougl., 4 *n.*

Male *v.* Roberts, 3 Esp., 163 (Eldon).

Nelson *v.* Bridport, 8 Beav., 527; 10 Jur., 871.

After such proof of a foreign law and its interpretation was made, the English courts held themselves bound by it, and it was not a question of fact for a jury but of law for the court as to the meaning and effect of the foreign law in the place of contract and of its enactment.

Copin *v.* Adamson, 9 L. R. Exch., 345; 31 L. T. (N. S.), 242; 43 L. J. Exch., 161; 22 W. R., 658.

Such being the rule of private international law between different independent nations when the American colonies came to form themselves first into a confederation of states and later into "a more perfect union," in which many of their rights of sovereignty and independence were merged, it was but natural that they should first recognize and then extend and establish as a part of their fundamental law that rule which previously had been a matter of international comity.

Hence we find in the Articles of Confederation that part of the rule relating to the records, acts and judicial proceedings of the different States, and the faith and credit to be accorded them in the other States was thus expressed: "Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State."

Articles of Confederation, Art. 4, § 3.

Manifestly this clause in the Articles of Confederation required full faith and credit to be given in all States (*a*) to the public records of each State, (*b*) to the public statutes or acts of each State, and (*c*) to the judgments and judicial proceedings of each State. However, like nearly all other provisions of the Articles of Confederation, it stopped short of the full accomplishment of its apparent purpose by not providing *a rule of evidence* which would be operative in and binding upon all the States of the confederation, sufficiently *authenticating* State records, acts and judicial proceedings. Hence when the Constitution of the United States was framed the clause in question was enlarged and extended so as to read as follows: "Full faith and credit *shall* be given in each State to the *public acts*, records and judicial proceedings of every other State. And the congress *may* by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

Const. U. S., Art. IV., § 1.

In the language of Judge Cooley:

"By this provision a rule of comity becomes a rule of constitutional obligation. It also becomes a uniform rule, and the common authority is empowered to pass laws whereby the courts may govern their action in receiving or rejecting the evidences presented to them of the public acts, records and judicial proceedings of other States. Nor is this of more importance to the States as such than to those whose individual interests may be involved or affected; and, indeed, the interests involved are usually private and individual rather than public.

"The full faith and credit to which the public acts, records and proceedings are entitled in other States is the same faith and credit to which they are entitled in the State whose acts, records and judicial proceedings they are."

Cooley's Principles of Const. Law (2d Ed.), p. 203.

And such is the meaning of the clause as construed by the late Chief Justice Waite and his associate Justices when he presided over the deliberations of the Supreme Court.

"Without doubt the constitutional requirement of Article IV., § 1, that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State,' implies that the public acts of every State *shall be given the same effect by the courts of another State that they have by law and usage at home.* * * * Whenever it becomes necessary, under this requirement of the Constitution, for a court of one State, in order to give faith and credit to a public act of another State, to ascertain what effect it has in that State, *the law of that State must be proved as a fact.*"

Chicago & Alton R. R. *v.* Wiggins Ferry Co., 119 U. S., 615, 622, 623.

It has been suggested (*a*) that the term "Public Acts" as used in the constitutional provision does

not mean legislative acts or statutes, and it has also been suggested (*b*) that § 905 of the Revised Statutes of the United States not having provided the *effect* to be given in each State to the public acts of other States, no federal question arises out of a failure to give to such public acts full faith and credit—that is, to give them the same effect that would be given them in the State of their enactment. It has also been suggested (*c*) that as the statutes of a State have no extra-territorial effect, a failure of the courts of one State to apply a statute of another State to a contract under consideration in such courts and which was made and to be performed in the State enacting the statute in question, and under and in accordance with such statute, involves no federal question. In short, it has been denied that effect must be given by the courts of one State to the statute of another State entering into and forming an integral part of a contract made and performable in the State where the statute was enacted, and that the same effect must be given to the statute as a part of the contract that would be given to it in the State of its enactment.

To these several questions, in their order of statement, we now address ourselves.

THE TERM "PUBLIC ACTS"—ITS MEANING: *The term "public acts" in Article IV., § 1 of the Constitution of the United States refers to the legislative enactments or public statutes of the several States.*

At the time of the adoption of the Constitution of the United States, the term "public acts" had a well settled meaning. It always referred to public statutes as distinguished from private statutes. "A general or public act is a universal rule that regards the whole community."

1 Blackstone's Commentaries, *p. 86.

On May 17, 1787, in the constitutional convention Mr. Randolph offered a form of a proposed Government in which the word "acts" was used.

"6th. Resolved, that each branch (of the legislative body) ought to possess the right of originating *acts*."

Eliot's Debates (2d Ed.), V. 5, pp. 126, 127 (Madison's Papers).

Again: "The 6th resolution (of May 17, see above) stating the cases in which the national Legislature ought to legislate was next taken into discussion. On the question whether each branch should originate *laws* there was a unanimous affirmative without debate."

Eliot's Debates, V. 5, p. 139 (Madison's Papers).

So Article VI. of Pinckney's proposed constitution in the last paragraph has

"All *acts* made by the Legislature of the United States, pursuant to this Constitution, and all treaties * * * shall be the supreme law of the land, and all Judges shall be bound to consider them as such in their decisions."

Eliot's Debates (2d Ed.), V. 5, p. 131 (Madison's Papers).

In June, 1787, during the debates in the constitutional convention Mr. Pinckney moved:

"That the national legislature should have authority to negative all *laws* which they should judge to be improper." He argued that such a universality of the power was indispensably necessary to render it effectual; that if the States were left *to act* of themselves in any case, it would be impossible to defend the national prerogative, however extensive they might be on paper; that the *Acts* of Congress had been defeated by this means.

Mr. Madison seconded the motion and said:

"He could not but regard an indefinite power to negative legislative *acts* of the States as absolutely necessary to a perfect system * * *. The States

would, of themselves, pass no operative *act* any more than one branch of a legislature. * * *.

"Mr. Gerry could not see the extent of such power and was against every power that was not necessary. He thought a remonstrance against unreasonable *acts* of the States would restrain them."

Eliot's Debates, V. 5, pp. 170, 171, 172.

Again: Mr. Patterson, among others, moved the following proposition:

"5. Resolved, that a Federal judiciary be established * * * to have authority to hear and determine, in all cases which may arise, any construction of any treaty or treaties, or which may arise on any of the *acts* for the regulation of trade * * *.

"6. Resolved, that all *acts* of the United States in Congress, made by virtue and in pursuance of the powers hereby * * * [conferred] shall be the supreme law of the respective States so far as those *acts* or treaties shall relate to said States * * *."

Eliot's Debates, V. 5, p. 192.

That the term "public acts" means legislative acts or public statutes is clearly shown by the form in which Art. IV., § 1 of the Constitution was first reported to the Constitutional Convention of 1787. The clause then read "full faith and credit shall be given in each State as to the *acts of the Legislature*," &c. This was subsequently shortened as a mere matter of style to the words "public acts," meaning, beyond doubt, acts of the Legislature, or statutes.

That the term "public acts," in Article IV., § 1 of the Constitution of the United States, has the meaning here contended for is, we think, clear upon both reason and authority.

Unity *v.* Burrage, 103 U. S., 447, 454.

"The words '*act* of the Congress' are as strong and unequivocal as *statute* of the Congress."

Story, *J.*, in United States *v.* Smith, 2 Mason, 143, 151.

"Acts are general or special, public or private. All legislative acts are laws, and if not laws then they are not acts of legislation."

People *v.* Tiphaine (N. Y.), 3 Parker's Cr. Rep., 244; s. c., 13 Howard's Prac. (N. Y.), 76, 77.

So much for the meaning of the term "public acts." Let us now consider the next contention stated above.

CONGRESSIONAL ACTION WAS NOT REQUIRED OR NECESSARY TO MAKE OPERATIVE THE CONSTITUTIONAL PROVISION THAT "FULL FAITH AND CREDIT *shall* BE GIVEN IN EACH STATE TO THE PUBLIC ACTS * * * OF EVERY OTHER STATE."

Article IV., § 1, of the Constitution of the United States originated in the Committee of Detail in the Constitutional Convention, and in its original form was reported by that committee as follows: "Full faith shall be given in each State *to the acts of the Legislatures* and to the records and judicial proceedings of the courts and magistrates of every other State."

"The Growth of the Constitution," Meigs, p. 254.
2 Madison's Papers, 1240.

When the clause thus reported by the committee of detail came before the Federal Convention for action, Mr. Randolph moved the following proposition: "Whenever the act of any State, whether legislative, executive, or judiciary, shall be attested and exemplified under the seal thereof, such attestation and exemplification shall be deemed in other

States as full proof of the existence of that act; and its operation shall be binding in every other State in all cases to which it may relate and which are within the cognizance and jurisdiction of the State wherein said act was done."

3 Madison's Papers, 1449.

At the same time Mr. Governeur Morris moved the following proposition on the same subject: "Full faith *ought* to be given in each State to the public acts, records and judicial proceedings of every other State, and the Legislature shall by general laws determine the proof and effect of such acts, records and proceedings."

These proposed forms of the clause in question, together with Article XVI. of the report of the committee of detail, were then referred to a committee consisting of Mr. Rutledge, Mr. Randolph, Mr. Gorham, Mr. Wilson and Mr. Johnson.

3 Madison's Papers, 1449.

This committee reported the clause back to the Federal Convention as Article XVI. in the following form: "Full faith and credit *ought* to be given in each State to the public acts, records and judicial proceedings of every other State; and the Legislature shall, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect which judgments obtained in one State shall have in another."

It is manifest that at this time the committee intended to provide expressly, *first*, how such public acts, records and judicial proceedings should be proven, and *second*, the effect which judgments obtained in one State should have in another, and that they did not then contemplate making an absolute requirement upon the courts of one State to give to the public statutes of another State the same meaning and effect that such statutes would have in the State of their enactment. This is shown by the fact that in the draft of the clause as reported

the word "*ought*" is used instead of the word "*shall*" in the clause as it was finally adopted.

3 Madison's Papers, 1479.

The clause came up for consideration again in the convention of September 3, 1787, and a debate then occurred as to whether the meaning and effect of the provision should be limited by certain suggested changes *so as to restrain its meaning and effect to judgments and judicial proceedings.*

3 Madison's Papers, 1480, 1481.

"Thereupon, on motion of Mr. Madison, the words '*ought to*' were struck out and '*shall*' inserted; and 'shall' between 'Legislature' and 'by general laws' struck out and 'may' inserted *nem con.*"

3 Madison's Papers, 1841.

Thereafter the "committee on style" reported the clause in question as it now stands in the Federal Constitution.

"The Growth of the Constitution," Meigs, 256.

Manifestly, the purpose of the framers of the Constitution was to require full faith and credit to be given to the public statutes of each State when pleaded and proven in the courts of a sister State in any case where rights had been established under such statutes, either by way of contract or otherwise, in the State passing the statute in question; and going a step further, the Constitutional Convention, after changing the term "ought" to the term "shall" so as to make the requirement of full faith and credit peremptory so far as the public statutes of sister States are concerned, authorized Congress to determine, first, how such public acts, records and judicial proceedings shall be authenticated, and, second, what effect shall be given in the courts of

one State to the judgments and judicial proceedings of another State.

Congress is without power to change the meaning or qualify the effect of the first paragraph of Article IV., § 1, of the Constitution, and, consequently, has never attempted to do so.

"The clause of the Constitution propounds three distinct objects: First, to declare that full faith and credit shall be given the records, &c., of every other State; secondly, to prescribe the manner of authenticating them; and, thirdly, to prescribe their effect when so authenticated. The first is declared and established by the Constitution itself and is to receive no aid, nor is it susceptible of any qualification by Congress. The other two are expressly subjected to the legislative power."

2 Story on the Constitution (5th Ed.), § 1308.

Section 905 of the Revised Statutes of the United States establishes the effect to be given to the judgments of sister States, and provides for the authentication and proof of those public acts to which Article IV., § 1, of the Constitution as adopted requires that full faith and credit *shall* be given.

It surely must have been the intent of Congress to give effect to the constitutional provision in question, as applied both to judgments and to public acts, by providing as to the effect of the judgments and as to the manner of authenticating and proving the acts. The acts of a sister State being thus authenticated and proven, it follows from the explicit language of the Constitution itself that full faith and credit must be given to such acts, and the term "full faith and credit" cannot reasonably be interpreted as having any other meaning than that in the construction of a contract or a corporate charter of which a statute of the State of the contract or corporate *situs* is an integral part, such statute, when properly pleaded and proven, must be given the same force and effect by the Court

considering the contract and the statute, that would have been given to such statute in the courts of the State where the contract was made and to be performed and the statute enacted.

" 'Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.' The language is positive and declaratory, leaving nothing to future legislation."

2 Story on the Constitution (5th Ed.), § 1309.

Whether in any case this doctrine should be extended, it is not necessary for us to discuss at this time or for this Court to determine now, but to deny the application of the constitutional provision for the purpose here indicated, is to make it possible for the courts of any State to practically nullify corporate membership contracts entered into in another State and valid under the public acts of such State, even though such contracts be made and performable in the State enacting such statutes, and be themselves regulative of the status of the corporation and its members.

" I apprehend that it is now established by the law of this country that one who becomes a shareholder in a foreign company, and therefore and thereby a member of that company, such company existing in a foreign country and subject in all things to the law of that country, himself becomes subject to the law of that country, and to the articles or constitutions of that company construed and interpreted according to the law of that country in all things and as to all matters and all questions existing or arising in relation to or connected with the acts and affairs and the rights and liabilities of such company and its members severally and collectively."

Kelly, *C. B.*, in Copin *v.* Adamson, L. R., Exch., 345, 349.

We do not deny that Congress *might* legislate as to the effect to be given to the statutes of one State when proven in another State, and by such legislation it is possible that for some purposes *extra-territorial* effect might be given to such statutes.

But Congress could not by any enactment constitutionally prevent State statutes from being given "full faith and credit" in other States. It might add to the constitutional provisions, but it cannot abridge the constitutional right. It might define the term "full faith and credit," but not having done so the common law meaning of the term prevails, and that meaning is that the same effect must be given to the statute of a sister State regulating the contract of membership of a corporate shareholder in a corporation of such sister State that the courts of the sister State have given to the statute.

Copin *v.* Adamson; Copin *v.* Strachan, 9 L. R. Exch., 345.

Canada So. R. Co. *v.* Gebhard, 109 U. S., 527.

Fish *v.* Smith, 73 Conn., 377.

Washington Central Bk. *v.* Hume, 128 U. S., 195, 207.

Coghlan *v.* So. Car. R'd. Co., 142 U. S., 101, 109.

Wayman *v.* Southard, 10 Wh., 1, 43.

It is not permissible for a State court to nullify a contract of corporate membership in another State by the avowal that comity does not require it to give effect to a statute of the sister State that forms a part of the very contract itself.

It is just here that the rule of "comity" has been superseded and that "the rule of constitutional obligation" becomes operative.

Huntington *v.* Attrill, 146 U. S., 657, 666, 684, 685, 686.

Whitman *v.* Oxford Nat. Bk., 176 U. S., 559, 564, 565.

McCullough *v.* Virginia, 172 U. S., 102, 116, 117.
Allgeyer *v.* Louisiana, 165 U. S., 578.
Holden *v.* Hardy, 169 U. S., 366, 391.

It must be conceded by opposing counsel that even in the State of South Carolina the rule of "comity" has always been that the "full faith and credit" to be given to the statute of a foreign jurisdiction forming a part of a contract, and properly proven as such, is to apply such statute in accordance with its terms and its settled construction in the jurisdiction of its enactment.

Fitzsimmons *v.* Guanahani Co., 16 So. Car., 195.
Thornton *v.* Dean, 19 So. Car., 583, 589.
Pegram *v.* Williams, 4 Rich. (So. Car.), L., 219.
Belcher *v.* Commissioners, 2 McCord (So. Car.), 23.
McCandlish v. Cruger, 2 Bay (So. Car.), 377.
Touro *v.* Cassin, 1 Nott. & McC. (So. Car.), 173.

"The principle is that the *lex loci contractus* is to be observed in deciding on the nature, validity and construction of the contract."

Levy *v.* Boas, 2 Bailey (So. Car.), 219.
Ayres *v.* Audubon, 2 Hill (So. Car.), 601.

"It has been repeatedly held by this Court and the United States Supreme Court that every contract made embodies the law governing such contract as much as if so stipulated in the contract in express terms."

Adler *v.* Cloud, 42 So. Car., 272, 291.

Therefore the statutes of New York as given in evidence in this case and their application by the

Courts of New York as proven in this case, were a part of the contract between the Eastern Building & Loan Association and its stockholder, Ebaugh, and as such must be given "full faith and credit" by the Courts of South Carolina, not as a matter of comity and favor, but as a matter of constitutional right invoked and insisted upon.

Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615.

Same Case, first appeal, 108 U. S., 18 22.

And the right of the parties to contract under and subject to the laws of New York, neither the Legislature nor the Courts of South Carolina can abridge or deny.

R. S. U. S., § 1977.

Yick Wo. *v.* Hopkins, 118 U. S., 356, 369.

Santa Clara Co. *v.* Southern Pac. R. Co., 118 U. S., 394, 396.

On the other hand the Courts of South Carolina cannot refuse to enforce the contract according to the laws of New York without violating the Fourteenth Amendment by destroying the liberty of contract and denying to plaintiff in error the "equal protection of the laws."

Allgeyer *v.* Louisiana, 165 U. S., 578.

Holden *v.* Hardy, 169 U. S., 366, 391.

This brings us to the third contention already stated, namely, that we are seeking to give extra-territorial effect to the laws of New York and that this the Courts of South Carolina are not required to do.

We concede that State statutes have no extra-territorial effect.

THE QUESTION IS NOT ONE OF THE EXTRA-TERRITORIAL EFFECT OF A STATE STATUTE IN ANOTHER

STATE. IT IS WHETHER A COURT OF ONE STATE CONSTRUING A CONTRACT OF CORPORATE MEMBERSHIP MADE AND PERFORMABLE IN ANOTHER STATE CAN REFUSE TO GIVE TO A STATUTE OF THE STATE OF THE CONTRACT THE SAME MEANING AND EFFECT, AS A PART OF THE CONTRACT OF MEMBERSHIP, THAT WOULD BE GIVEN TO IT IN THE STATE OF THE CORPORATE *situs*.

We insist that in the case at bar the statutes of New York and the Articles of Association and By-Laws of the Eastern Building and Loan Association enter into and form an inseparable part of the contract of corporate membership and that full faith and credit can only be given to the laws of New York by giving to them the same effect in connection with the contract of membership that has been given them by the courts of New York.

Glenn *v.* Garth, 147 U. S., 360.
Canada So. R. Co. *v.* Gebhard, 109 U. S., 527, 537.
Chase *v.* Curtis, 113 U. S., 452, 458.
Whitman *v.* Oxford Nat. Bk., 176 U. S., 559, 564, 565.
Carpenter *v.* Strange, 141 U. S., 87, 103.

"Whenever a court of one State is required to ascertain what effect a public act of another State has in that State, the law of such other State must be proved as a fact."

Lloyd *v.* Matthews, 155 U. S., 222, 227.

And when so proven, as in the case at bar, then not only the validity, but the construction and effect of the law must be determined by the State court in accordance with the Constitution and judicial decisions of the State by whose Legislature it was enacted.

Lloyd *v.* Matthews, 155 U. S., 222, 227.
Chicago, etc., R. Co. *v.* Wiggin's Ferry Co., 119 U. S., 615.

In no other way can full faith and credit be given *to the "public acts" and "judicial proceedings" of* "another State," as required by § 1 of Art. IV. of the Federal Constitution.

We submit that any decisions, or any *dicta*, in any opinion, of this Court not in harmony with these views cannot be sustained as against the foregoing line of reasoning based upon the history of the constitutional provision in question and the plain meaning of that provision in the light of the prior common law.

We have in the case at bar proven the "public acts" and "judicial proceedings" of the State of New York in strict conformity with § 905 of the Revised Statutes.

We have thereby complied with the rule laid down in the *Wiggins Ferry* cases and in *Lloyd* v. *Matthews*.

We have invoked the "full faith and credit" clause of the Federal Constitution in the State Courts and been told, in substance, that the laws of New York, even though they form a part of a contract made and performable in New York, will not be treated as a part of the contract by the courts of South Carolina. This is not a "construction" of these laws, but a denial of their validity as parts of the contract and a refusal to give them *any* effect and, therefore, this Court has jurisdiction to review this case upon its merits.

May it not well be queried in this connection whether a State may, through judicial proceedings, take possession of the assets of a solvent foreign corporation in its limits by suit and judgment against the corporation, and distribute such assets or their proceeds among the stockholders of the foreign corporation resident in such State, in such a manner as to give to such resident stockholders more than their paid in or *pro rata* share of the corporate capital stock, thereby discriminating against the corporate stockholders in other States having

equal rights and interests in the corporation and its *capital stock and assets?*

Compare:

Blake *v.* McClung, 172 U. S., 239, 247.
Blake *v.* McClung, 176 U. S., 59 63, 65, 68.

The Judiciary Act of 1789 provided that:

"The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise provide, shall be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply."

R. S. U. S., §721.

It will be noticed nothing is said as to the effect of such laws or the faith and credit to be given them. It is merely provided that they shall be "rules of decision," a far less definite term than the constitutional language which is that "full faith and credit *shall* be given in each State to the public acts * * * and judicial proceedings of every other State."

But this Court has uniformly held that as "rules of decision" State statutes establishing rules of property can be given full faith and credit only by giving them the same construction, interpretation and effect which they have in the State of their enactment.

Walker *v.* State Harbor Comrs., 17 Wall., 648, 651.
Randall *v.* Brigham, 7 Wall., 523.
Allen *v.* Massey, 17 Wall., 351.
Ohio *v.* Frank, 103 U. S., 697.
Green *v.* Neal's Lessee, 6 Pet., 291, 299.
Bucher *v.* Cheshire R. Co., 125 U. S., 582.
Hartford Ins. Co. *v.* Chicago, &c., R. Co., 175 U. S., 100.

Carrying the analogy a step farther, this Court has held in many cases that the construction of a

State statute by the Courts of the State of its enactment forms a part of the statute and will be followed, no federal question being involved, even though this Court does not agree with such construction.

Forsyth *v.* Hammond, 166 U. S., 518.
Board *v.* Louisiana, 179 U. S., 622.
Jaffray *v.* McGehee, 107 U. S., 361, 365.
Brashear *v.* West, 7 Pet., 608.
May *v.* Tenney, 148 U. S., 60, 64.
Louisiana *v.* Pilsbury, 105 U. S., 278, 294.
South Branch Lumber Co. *v.* Ott, 142 U. S., 622, 628.

And this principle is so rigidly observed that where the same statute has been enacted in different States and the Courts of such States differ in their construction of it, this Court will follow the different constructions in cases coming from the different States, even though the statute thus becomes "a different law in one State from what it is in the other."

Union Bank of Chicago *v.* Kansas City Bk., 136 U. S., 223, 235.

And so this Court will change its construction in obedience to later decisions of a State court of last resort changing the construction of a statute of such State, when no vested rights or contract obligations will be affected thereby.

Leffingwell *v.* Warren, 2 Bl., 599.
Wade *v.* Travis Co., 174 U. S. 499, 508.
Bauserman *v.* Blunt, 147 U. S., 647.
Moores *v.* Bank, 104 U. S., 625.

So the construction as to the powers of a corporation placed by the highest Court of a State upon a State statute chartering it is conclusive in this Court.

Smith *v.* Kernochen, 7 How., 198.

And in like manner the construction by the State courts of a clause regulating the liability of stockholders in a State statute authorizing the formation of corporations will be followed by this Court.

Flash *v.* Conn., 109 U. S., 371.

"It is also settled that the laws which subsist at the time and place of the making of a contract and where it is to be performed, *enter into and form a part of it*, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its *validity*, CONSTRUCTION, DISCHARGE and enforcement."

Mr. Justice Swayne in Von Hoffman *v.* City of Quincy, 4 Wall., 535, 550.

These doctrines of this Court all rest upon the principle for which we contend, namely, that in order to give full faith and credit to a statute of one jurisdiction when it comes before the courts of another jurisdiction, it must be given the same effect that it has by law or judicial interpretation in the State of its enactment; and as the Constitution says full faith and credit *shall* be given in each State to the public acts and judicial proceedings of every other State, this can only be done in a case where a contract made and to be performed under the laws of a sister State is involved, by treating those laws as a part of the contract and giving them the same force and validity as a part of such contract that they would have at the *situs* of the contract. Nothing short of this is "full faith and credit," and congressional action to determine what full faith and credit means would be a work of supererogation.

We now pass to a discussion of the other federal questions that were expressly raised in this case in the court below, or which arise by necessary implication on the face of the record.

II.

THE JUDGMENT OF THE SUPREME COURT OF SOUTH CAROLINA DENIES TO PLAINTIFF IN ERROR THE "EQUAL PROTECTION OF THE LAWS" AND DEPRIVES IT OF THE LIBERTY OF CONTRACT GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES AND THE FOURTEENTH AMENDMENT THERETO.

What constitutes "the equal protection of the laws" and liberty of contract is not defined in the Fourteenth Amendment itself, but must be determined by reference to the general law of the land.

U. S. *v.* Wong Kim Ark, 169 U. S., 696.

The amendment seems to crystalize into the Constitution certain fundamental principles of Magna Charta and our own Declaration of Independence.

Brannon: "The Fourteenth Amendment," 315-320.

Wally's Heirs *v.* Kennedy, 2 Yerg (Tenn.), 554.

That the "equal protection of the laws" clause applies to corporations is now settled law, and hence we need only discuss here the question whether the judgment of the Supreme Court of South Carolina in the case at bar denies to plaintiff in error "the equal protection of the laws" within the rational meaning of the amendment itself.

Smith *v.* Ames, 169 U. S., 466.

The record in this case shows that defendant in error, a citizen of South Carolina, made application in writing for membership and stock in the plaintiff in error; that such application was made in accordance with the by-laws of the corporation, in the State of New York at the corporate *situs;* that defendant in error expressly agreed to assume all the

burdens and obligations of a stockholder and observe and be bound by the corporate articles and by-laws and the laws of the State of New York regulating the Eastern Building and Loan Association and like corporations of New York.

Transcript, pp. 10, 11, 12.

The application for shares and the stock certificate on which Ebaugh relies as obligating the corporation to pay him the par value of his shares at the expiration of seventy-eight months, even though the stock has not attained its par or maturity value, are in direct conflict with his claims, and show that the corporate Articles of Association and by-laws enter into and form a part of the contract of membership which cannot be disregarded.

Transcript, pp. 10, 11.

The application contains this clause: "I hereby agree to abide by all the terms, conditions and by-laws contained or referred to in the certificate of shares, and will also comply with all the rules and regulations of said Association."

Transcript, p. 10.

The stock certificate recites that the by-laws of the corporation "are hereby referred to and made a part of this contract."

Transcript, p. 10.

The certificate then provides that all payments to the stockholder upon the certificate "are payable at home office of the Association at Syracuse, N. Y., within sixty days after the acceptance and approval of satisfactory proofs."

Transcript, p. 11.

The conditions stated in the stock certificate and subject to which it is issued are set out in full in the

record. Those that seem to be material here are as follows:

"This certificate of shares is issued to and accepted by the holder thereof upon the following express terms and conditions:

"FIRST.—The shareholder agrees to pay or cause to be paid, a monthly instalment of seventy-five cents on each share named in this contract, the same to be paid on or before the last Saturday of each month *until such share matures or is withdrawn.* * * *

"FOURTH.—Any members in good standing may withdraw their monthly instalments at any time by first giving thirty days' notice, and will receive six per cent. annual interest on all shares of six months' standing, and up to two years; the third year seven per cent.; and any time after the third year, and before maturity, eight per cent.

"FIFTH.—If a shareholder dies, his personal representative may withdraw his shares at any time, or continue on to maturity.

"SIXTH.—At stated periods, the profits arising from interest, premiums, fines and other sources, shall be apportioned among the shares in good standing.

"SEVENTH.—All payments must be paid to an authorized agent, or sent to the secretary at the home office by draft, express, or money order, or registered letter. Individual drafts or checks not receivable. * * *

"NINTH.—The by-laws of this association, which are attached to and endorsed hereon, are a part of this contract, and such by-laws and this certificate are to be construed together as part of the contract between the association and the shareholder."

Transcript, pp. 11, 12.

It will be noted that the "ninth" condition above quoted makes the by-laws a part of the contract with the shareholder.

Transcript, p. 11.

The by-laws thus made a part of the contract of membership were given in evidence, and appear in full in the record.

Transcript, pp. 54–62.

Section 1 of Article XI. of the by-laws divides the funds of the Association into two classes known as loan and expense funds respectively, and provides that a part of the capital payments or "dues" paid in by stockholders shall be set apart and used for expenses.

Transcript, p. 57.

The necessary consequent of this is that members cannot, upon withdrawal or at any time before the maturity of their shares, receive back the full amount of their contributions to the capital stock, unless the *net* profits of the corporation have been sufficient to pay all expenses and provide for all contingencies.

The obligation of the stockholder to continue paying "dues" until his stock becomes fully paid is made clear by a by-law provision, which gives the corporation a lien upon the stock itself to secure such payments.

Transcript, p. 60,
By-Laws, Art. XIV., § 13.

And the amount to be paid *monthly until the stock is "fully paid,"* is expressly fixed at seventy-five cents per share.

Transcript, p. 60,
By-Laws, Art. XIV., § 14.

Stockholders whose stock has been fully paid or become matured to its par value by payments

thereon plus profits earned can, of course, receive the par or maturity value of such stock.

Transcript, p. 52,
Articles of Incorporation, Art. XV.
Transcript, p. 61,
By-Laws, Art. XIV., § 21.

When stock has not been fully paid and the profits have not been sufficient to mature it the holder is only entitled to withdraw *the amount paid into the "loan fund,"* plus certain profits according to the length of time the stock has been in force.

Transcript, pp. 60, 61,
By-Laws, Art. XIV., §§ 18, 19.

But "in no case shall a withdrawal from the loan fund exceed the amount of the instalments paid thereto, together with the estimated amount of *the earnings* upon the same," and the amount paid as interest or profits to withdrawing stockholders "shall not exceed the *net* earnings of said stock."

Transcript, p. 51,
Articles of Incorporation, Art. XII.

Finally, in order to fix the *status* of members and their rights of payment and withdrawal beyond cavil it is provided not only that payments to such members will only be made at the home office in New York, but also that:

"Any action brought against this Association shall be commenced within six months after filing proofs, *and in the County of Onondaga and State of New York.*"

Transcript, p. 12,
Stock certificate, condition "Fourteenth."

On this state of facts and under these Articles of Incorporation and by-laws defendant in error for a period of seventy-eight months paid to plaintiff in error the sum of seventy-five cents per month

on each of his shares of stock. This amounted in the aggregate to but $58.50 paid in by him upon each share of stock, or a total payment upon his ten shares of but $585. There had been some profits earned by the Association at the expiration of the seventy-eight months' period, and it appears that the book value of the stock at that time (*i. e.*, the amount paid in upon it plus profits) was $600.40.

Transcript, p. 46, *68.

At the expiration of the seventy-eight months' period and after some correspondence between plaintiff in error and defendant in error, defendant in error Ebaugh on October 19, 1898, filed his certificate of stock for withdrawal, first endorsing the same as follows:

"The within mentioned shares of stock in the Eastern Building and Loan Association of Syracuse, New York, are hereby withdrawn; and I have this day received the sum of $———— in full of the amount.

"Dated at Greenville, S. C., October 15, 1898.

"D. W. EBAUGH, [SEAL.]"

Transcript, pp. 44, *64, Ev. of N. C. Visscher; Tr., pp. 44–47, correspondence.

In view of the fact that Ebaugh's stock was not fully paid and had not attained its par or maturity value, and that its book value was but $600.40, the Association was compelled to refuse payment of the par value of the ten shares as demanded by Ebaugh, but offered and stood ready to pay their withdrawal value under the laws of New York. And thereupon, taking advantage of the fact that plaintiff in error was within the jurisdiction of South Carolina, being authorized to do business in that State and having an agent there, Ebaugh, in January, 1899, began the

action which is now before this Court upon the writ of error in this case.

Transcript, pp. 2–4, "Complaint."
Transcript, pp. 4–9, "Answer."

As we have already seen, the plaintiff in error as defendant below gave in evidence and duly proved the Articles of Incorporation and by-laws of the corporation; the application for stock and the stock certificate of defendant in error; the "Public Acts" of New York under which plaintiff in error was incorporated and the "judicial proceedings" of the courts of New York adjudging the *status* of members in corporations organized under said laws in cases like the one at bar.

Ante, *pp.* 4 and 5.
Transcript, pp. 10–12, 31–35, 35–38, 38–41, 42, 47–54, 54–62.

On this state of the record we insist that the decision and judgment of the Supreme Court of South Carolina denied to plaintiff in error "the equal protection of the laws" within the true meaning and intent of the Fourteenth Amendment.

Allegeyer *v.* Louisiana, 165 U. S., 578.
Holden *v.* Hardy, 169 U. S., 336, 391.

The refusal of the Supreme Court of South Carolina to enforce the corporate articles and to recognize the validity of the statutes of New York forming an integral part of the contract of membership between the defendant in error and plaintiff in error, was in and of itself a denial of "the equal protection of the laws" to plaintiff in error, and a discrimination in favor of defendant in error because of his citizenship in South Carolina that violates the principles of the Fourteenth Amendment.

Brannon, "The Fourteenth Amendment," 97, 98.
Barbier *v.* Connolly, 113 U. S., 27.

Blake *v.* McClung, 172 U. S., 239, 247.
Blake *v.* McClung, 176 U. S., 59, 63, 65, 68.
Sully *v.* Am. Nat, Bk., 178 U. S., 289, 303.
Belfast Sav. Bk. *v.* Stowe, 92 Fed. Rep., 102, 103, 104.

Ebaugh by reason of his contract of membership acquired vested contract rights which cannot be impaired and may be enforced by him under the laws of New York.

Bedford *v.* Eastern B. & L. Assn., 181 U. S., 227, 240.

Therefore the association had corresponding rights as against him, and the State of South Carolina cannot, by a judicial decision, discriminate in his favor, and at the same time deny validity to the laws of New York forming a part of the contract itself. This violates alike the "full faith and credit" clause of the Federal Constitution and the "equal protection of the laws" clause of the Fourteenth Amendment.

Sully *v.* Am. Nat. Bk., 178 U. S., 289, 303.

The several decisions we have already cited from the South Carolina reports show that the established rule in that State has been that contracts are to be enforced in South Carolina in accordance with the statutes and decisions of the jurisdiction where the contract was made and is to be performed.

Ante, p. 34.

Yet, in the case at bar, as in the Welling and Bonnoitt case, the Supreme Court of South Carolina refuse to apply this established rule upon the express ground that it might result in injury to one of the citizens of South Carolina as between himself and a corporation of New York. This is equivalent to an

express denial of the "equal protection of the laws" as between the stockholders of plaintiff in error resident in South Carolina and those resident in New York and other States, and as the corporation in this case represents all its stockholders, it seems clear that there has not only been a denial of the "equal protection of the laws" but likewise an absence "of due process of law."

"Carhart as a non-resident unsecured creditor * * * has the right to share in the distribution of the assets of the Carnegie Land Company upon the same level as like creditors of the company who are residents of the State of Tennessee, and as the decree below denies him that right, it must be reversed as to him for that reason."

Sully *v.* Am. National Bank, 178 U. S., 289, 303.

Certainly this principle fits the case at bar, because the effect of the judgment of the Supreme Court of South Carolina is to take the corporate funds belonging in equal ratio to all stockholders of the plaintiff in error and by "robbing Peter," who happens to live in New York or Virginia, "to pay Paul" merely because the latter lives in South Carolina. Surely such a doctrine as this cannot be countenanced by this Court.

III.

NOT ONLY DOES THE JUDGMENT OF THE SUPREME COURT OF SOUTH CAROLINA DENY FULL FAITH AND CREDIT TO THE LAWS OF NEW YORK AND DENY TO PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAWS, BUT IT ALSO IMPAIRS THE OBLIGATION OF A CONTRACT AND DENIES TO PLAINTIFF IN ERROR ANY REMEDY IN THE COURTS OF SOUTH CAROLINA UPON A

CONTRACT VALID UNDER THE LAWS OF NEW YORK, IN WHICH STATE THE CONTRACT WAS MADE AND IS TO BE PERFORMED. IN THUS DENYING THE CONTRACT RIGHTS OF THE CORPORATION IN THE COURTS OF SOUTH CAROLINA AS AGAINST THE CITIZENS OF THAT STATE, IT DEPRIVES PLAINTIFF IN ERROR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

We concede the rule to be that the obligation of a contract is not "impaired" within the meaning of § 10 of Art. I. of the Constitution by mere judicial legislation which under the guise of "construction" not only impairs but actually destroys the obligation of a contract.

New Orleans Water Works Co. *v.* Louisiana Sugar Co., 125 U. S., 18, 30.

Knox *v.* Exchange Bank, 12 Wall., 379, 383.

But we insist that this doctrine that only *State statutes* impairing the obligation of contracts are obnoxious to the constitutional provision has been limited and qualified by those commanding authorities which secure justice by declaring that when a contract has been entered into under a given state of judicial decisions construing a State statute or Constitution, no *subsequent* judicial oscillation can impair its obligation.

Gelpcke *v.* Dubuque, 1 Wall., 206.

Township of Pine Grove *v.* Talcott, 19 Wall., 677.

Olcott *v.* Supervisors, 16 Wall., 690.

Douglass *v.* County of Pike, 101 U. S., 677.

Burgess *v.* Seligman, 107 U. S., 20, 33.

Pleasant Township *v.* Ætna Life Ins. Co., 138 U. S., 67, 73.

It is but a step, and a step which we think should now be taken, from this doctrine to the enunciation

of the principle that when a contract of which a State statute is a necessary element and an integral part, is entered into in a State which is the place of contract and performance both, that the courts of another State cannot change the settled construction of such statute as fixed by the decisions of the State of its enactment, and by a totally new and variant construction not only impair the obligation of the contract, but destroy the contract and refuse to give effect to the statute as a part of the contract, determining its obligation.

See: Bedford *v.* Eastern Building & Loan Assn., 181 U. S., 227, 241.

"The obligation of a contract is the law which binds the parties to perform their agreement."

Von Hoffman *v.* the City of Quincy, 4 Wall., 552.

Bedford *v.* Association, *supra.*

McCraken *v.* Hayward, 2 How., 608, 612.

This obligation of the contract in the case at bar is found in the New York statutes, the corporate charter and the corporate by-laws as applied by the courts of New York. These and these alone constitute "the law which binds the parties to perform their agreement." "The law, then, which has this binding obligation, must govern and control the contract, in every shape in which it is intended to bear upon it, whether it affects its validity, construction or discharge."

Ogden *v.* Saunders, 12 Wh., 257.

"The obligation of a contract made within a sovereign State, must be precisely that allowed by the law of the State and none other."

Ogden *v.* Saunders, 12 Wh., 320.

"I conclude that, so far as relates to private contracts between individual and individual, it is the civil obligation of contracts—*that obligation which is recognized by, and results from the law of the*

State in which the contract is made, which is within the meaning of the Constitution."

Ogden *v.* Saunders, 12 Wh., 321, 822.

"It follows that the States have, since the adoption of the Constitution, the authority to prescribe and declare by their laws, respectively, *what shall be the obligation of all contracts made within them.*"

Ogden *v.* Saunders, 12 Wh., 322.

The State of New York, by its statutes—its "Public Acts"—by the grant of its charter of incorporation and the by-laws made in pursuance thereof, and by its judicial decisions applying its statutes and fixing their meaning, declared and settled "the obligation" of the contract of membership of Ebaugh in the Eastern Building and Loan Association, at the time that contract of membership was made. Does it not follow that no other State can—either by statute or judicial legislation—impair the obligation of that contract, and that the judgment of the Supreme Court of South Carolina in the case at bar not only impairs the obligation of the contract, but does so by denying the validity of the laws of New York, refusing full faith and credit to the Public Acts and judicial proceedings of that State and destroying the liberty of contract itself.

Allgeyer *v.* Louisiana, 165 U. S., 590, 591.

Bedford *v.* Eastern B. & L. Assn., 181 U. S., 227.

Holden *v.* Hardy, 169 U. S., 390, 391.

At the time that Ebaugh, a citizen of South Carolina, became a member of the New York corporation, assuming the burdens and acquiring the rights of membership in accordance with the laws of New York (*Canada Southern R. Co.* v. *Gebhard*, 109 U. S., 527; *Bedford v. Eastern B. & L. Assn.*, 181 U. S., 227) the settled law of South Carolina, estab-

lished by repeated decisions of its Supreme Court, was: "That every contract made embodies the law governing such contract as much as if so stipulated in the contract in express terms," and "that personal contracts are to have the same validity, interpretation and obligatory force in" South Carolina "which they have in the country where they were made."

Adler *v.* Cloud, 42 So. Car., 272, 291.
Cooper *v.* Waldegrave, 2 Beav. (So. Car.), 282.
Thornton *v.* Dean, 19 So. Car., 583, 589.
Fitzsimmons *v.* Guanahani Co., 16 So. Car., 195.
And see South Carolina cases cited *ante*, pp. 21 and 34.

Such was the South Carolina law when Ebaugh acquired his membership in the Eastern Building and Loan Association, but by its decision in this case and its prior decision in the case of *Welling and Bonnoitt*, the Supreme Court of South Carolina has abandoned this universal rule of the general common law and substituted for it the monstrous doctrine that it is not bound either by comity or constitutional obligation to enforce Ebaugh's contract of membership in accordance with the laws of New York.

Welling and Bonnoitt *v.* Eastern B. & L. Assn., 56 So. Car., 280, 296, 297.

We submit that in accepting Ebaugh, a citizen of South Carolina, as a member and a stockholder, the Eastern Building and Loan Association had a right to rely upon the law of South Carolina with reference to contracts made and to be performed in another State, as that law regulating the construction of contracts dependent upon the statutes of other States then stood, and that the change of judicial decision as to the statutes of other States, as evidenced by the *Welling and Bonnoitt* case and the case at bar, does impair the obligation of a con-

tract within the true meaning and intent of the constitutional provision.

Olcott *v.* The Supervisors, 16 Wall., 678.

Loeb *v.* Columbia Township Trustees, 179 U. S., 472, 492, 493.

We are aware that the doctrines here contended for in relation to the impairment of the obligation of contracts are apparently in conflict with late and leading cases.

Central Land Co. *v.* Laidley, 159 U. S., 103.

Bacon *v.* Texas, 163 U. S., 216.

These cases do not involve a change of State decisions affecting vested rights under a contract made and to be performed in another State, and of which a statute of the State of the contract, together with the decisions of such State construing it formed a necessary and inseparable part. In the case at bar the Supreme Court of the State of South Carolina has decided that the statutes of New York, the New York judicial decisions and the certificate of incorporation and by-laws of the plaintiff in error are not a contract binding upon the defendant in error. This Court is not bound by a State Court decision holding that not a contract which has been alleged to be so in accordance with the forms of law and for the protection of the obligation of which the Federal Constitution has been invoked.

Jefferson Branch Bank *v.* Skelly, 1 Bl., 436, 443.

McCullough *v.* Virginia, 172 U. S., 102, 109.

In such cases, assuming that the constitutional provision has been properly invoked, this Court will determine the meaning and effect of the contract in accordance with the laws of the contract *situs*.

Sioux City R. Co. *v.* North American Trust Co., 173 U. S., 99, 100.

It should not be overlooked that this litigation was not instituted in the jurisdiction of the corporate *situs*, as it should have been (Clark *v.* Mutual Reserve Fund Life Assn. (D. C.), 43 L. R. A., 390, 397; Taylor *v.* Mutual Reserve Fund Life Assn. (Va.), 45 L. R. A., 149; Leary *v.* Columbia River, &c., Co., 82 Fed. Rep., 775; Sidway *v.* Missouri Land, &c., Co., 101 Fed. Rep., 481; Republican Mountain Silver Mines *v.* Brown, 58 Fed. Rep., 644). It was begun in South Carolina by defendant in error *seeking affimative relief*, and prosecuted to judgment there upon the principle that the courts of South Carolina were not bound to enforce contracts made and performable in New York, in accordance with New York laws, but could enforce the New York law so far as it was advantageous to defendant in error, and deny the application of plain, unequivocal, statutory provisions of New York when adverse to his interests. This may be "due process of law," but if so it is neither justice nor honesty, nor does it accord to plaintiff in error the "equal protection" of the law which the XIVth amendment guarantees.

The contention of defendant in error is in effect that this contract with the plaintiff in error is not embodied in the stock certificate, articles of incorporation and by-laws, taken together, but is limited to the provisions of the stock certificate, and that there is in fact no such contract as that claimed by plaintiff in error; and the courts of South Carolina, by ignoring the provisions of the New York statutes and the articles of association and by-laws and the decisions of the New York courts, virtually sustain this contention.

"We have often had occasion to say that this Court, when reviewing the final judgment of a State Court upholding a State enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for itself the existence or the non-exisience of the con-

tract set up, and whether its obligation has been impaired by the State enactment."

Chicago, &c., R. *v.* Nebraska, 170 U. S., 57, 68.

Von Hoffman *v.* Quincy, 4 Wall, 535, 550.

If this Court thus protects a contract against State legislation under the contract clause of the Federal Constitution, will it not protect a contract against the decision of a State Court which refuses full faith and credit to the laws of a sister State and abrogates a contract upon the pretense of construing it? Repudiation and confiscation are not "construction" and "interpretation."

See Western Mass., &c., Ins. Co. *v.* Hilton, 42 App. Div. (N. Y.), 52, 58, 59.

Chicago, &c., R. Co. *v.* Wiggins Ferry Co., 108 U. S., 18, 22.

Chicago, &c., R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615.

The decision of the Supreme Court of South Carolina in the case at bar denies to plaintiff in error all remedies upon its contract with defendant in error as a stockholder and refuses to hold him to his obligations as such. No State can so deny the enforcement within its jurisdiction of valid contracts under the law of a sister State.

Edwards *v.* Kearzey, 96 U. S., 595, 600, 601.

The Homestead Cases, 22 Gratt. (Va.), 266; s. c., 12 Am. Rep., 507, 514, 515.

White *v.* Hart, 13 Wall., 646, 654.

Cæsar *v.* Cappell, 83 Fed. Rep., 403.

Eastern Building & Loan Assn. *v.* Bedford, 88 Fed. Rep., 7.

Allgeyer *v.* Louisiana, 165 U. S., 578.

This Court held in the Bedford case that while conditions upon which foreign corporations may do business in any State are a matter of State regulation, yet under this power a State cannot discharge citizens of such State from their contract obligations made and performable in another State. Can a State by a Supreme Court decision do what it would not be permitted to accomplish by legislative action?

Bedford *v.* Eastern Building & Loan Assn., 181 U. S., 228.

It also seems that the decision of the Supreme Court of South Carolina deprives plaintiff in error of its liberty to contract and of its property without "due process of law."

The effect of the decision is to require plaintiff in error, in violation of the statutes of New York and the provisions of its charter and by-laws, to pay defendant in error a sum of money for each share of stock held by him, largely in excess of payments made by him upon the stock, plus his *pro rata* share of the profits of the corporation (*ante*, pp. 45 and 46). This certainly deprives the corporation of its property and interferes with its liberty of contract. But does it do so without "due process of law"?

"This Court has never attempted to define with precision the words 'due process of law.'"

Holden *v.* Hardy, 169 U. S., 366, 389.

But the constitutional restriction undoubtedly applies to the *judicial* as well as to the executive and legislative powers of a State.

Murray's Lessees *v.* Hoboken Land Co., 18 How., 272, 276.

Hence, we submit that a State court cannot by *judicial legislation* abrogate a contract valid in another State, entered into under the laws of that State and performable in such other State, without

violating that clause of the XIVth amendment to the Constitution of the United States, which provides that no State "shall * * * deprive any person of life, liberty or property without due process of law."

Holden *v.* Hardy, 169 U. S., 366, 390, 391.
Allgeyer *v.* Louisiana, 165 U. S., 578.

"For 'upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them'; and 'if they fail therein, and withhold or deny rights, privileges or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination.'"

In re Wood, 140 U. S., 278, 286.
Robb *v.* Connolly, 111 U. S., 624, 637.
Neal *v.* Delaware, 103 U. S., 370, 386, 387.

It would certainly be anomalous to hold that a contract made and to be performed in New York and valid under the laws of New York could be impaired as to its obligation by the Supreme Court of South Carolina, at the suit of a party resident in that State, in violation of the plain terms of the contract and of the laws of New York, without the denial of full faith and credit to the laws of New York. Yet such is the effect of the contention of counsel for defendant in error in this case.

IV.

WE SUBMIT THAT THE MAKING OF THE CONTRACT OF MEMBERSHIP BETWEEN THE EASTERN BUILDING AND LOAN ASSOCIATION, A CORPORATION OF NEW YORK, AND EBAUGH, THE DEFENDANT IN ERROR, A CITIZEN AND RESIDENT OF SOUTH CAROLINA, WAS A COMMERCIAL TRANSACTION, AND BY REASON OF THE MANNER IN WHICH THE CONTRACT OF MEMBERSHIP WAS ENTERED INTO AND THE LAWS UNDER WHICH IT WAS MADE, IT MUST BE TREATED AS A TRANSACTION IN THE NATURE OF INTERSTATE COMMERCE, AND THEREFORE A FEDERAL QUESTION EXISTS WHICH THIS COURT HAS JURISDICTION TO DETERMINE.

We do not consider that the question here raised is in any way concluded by those cases holding that contracts of insurance are not commerce, being mere contracts of indemnity against loss.

Paul *v.* Virginia, 8 Wall., 168, 183.
Liverpool Ins. Co. *v.* Mass., 10 Wall., 566, 573.
Hooper *v.* California, 155 U. S., 648, 653, 654.
New York Life Ins. Co. *v.* Cravens, 178 U. S., 389.

Neither is the case of *Nathan* v. *Louisiana*, in which it was held that a broker engaged in the sale and transfer of foreign bills of exchange, was not engaged in the transaction of interstate commerce, and, therefore, not exempted from a State law imposing a tax on exchange and money brokers, an authority against the contention which we now make.

Nathan *v.* Louisiana, 8 How., 73, 80.

In that case it was conceded that "money is * * * an instrument of commerce, and so is a

bill of exchange," and the law is now well settled that a State tax upon an instrument of interstate commerce is unconstitutional.

Western Union Tel. Co. *v.* Pennsylvania, 128 U. S., 39.

Ratterman *v.* Western Union Tel. Co., 127 U. S., 411, 423.

LeLoup *v.* Port of Mobile, 127 U. S., 640.

From this it necessarily follows that a State law prohibiting a foreign corporation from doing business in such State, if construed as preventing a citizen of the State from assuming a promissory obligation payable to such foreign corporation in the State of its corporate *situs* would be a regulation of an instrument of interstate commerce, and therefore within the inhibition of the Federal Constitution.

Hamilton's Works (Lodge's Ed.), Vol. 3, pp. 179, 203.

Prentice on "The Commerce Clause," 47, 48.

Osborn *v.* U. S Bank, 9 Wh., 738, 859, 867.

Likewise a law preventing a foreign corporation from accepting a promissory obligation payable at the corporate domicile and transmitting in exchange therefor, either in currency or by draft, money advanced to the maker of the obligation, would be an unconstitutional interference with interstate commerce.

Welton *v.* Missouri, 91 U. S., 275, 277.

It is left unsettled, so far as the decisions of this Court are concerned, whether the sending of a note from one State to another, to be discounted in the latter State, is interstate commerce.

Bamberger *v.* Schoolfield, 160 U. S., 149, 167.

The determination of what is commerce between the States rests upon the general commercial usages of the country and the construction of the commerce clause of the Federal Constitution by this Court.

Schollenberger *v.* Pennsylvania, 171 U. S., 1.
Bowman *v.* Railway Co., 125 U. S., 465, 501.

It is not an essential of interstate commerce that there shall be a transportation of goods or merchandise between the States. "Interstate commerce consists of intercourse and traffic between the citizens and inhabitants of different States and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities."

Addyston Pipe & Steel Co. *v.* United States, 175 U. S., 211, 241.
Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196, 203.
Kidd *v.* Pearson, 128 U. S., 1, 20.
County of Mobile *v.* Kimball, 102 U. S., 691, 702.

Certainly the transaction in the case at bar was both "intercourse" and "traffic" between citizens and inhabitants of different States.

FIRST.—Defendant in error, Ebaugh, subscribed for part of the capital stock of the plaintiff in error, agreeing to pay for such stock in monthly installments called "dues," and to continue such payments until the stock should attain its par value, and by such subscription for stock in the plaintiff in error, defendant in error acquired, as a stockholder, an undivided interest in the corporate properties at the

corporate *situs*, subject to his promissory obligation to pay for that interest in full.

Murfree on Foreign Corp., § 381.
Bank of Augusta *v.* Earle, 13 Pet., 519.
Plimpton *v.* Bigelow, 93 N. Y., 592.
Moore *v.* Gennett, 2 Tenn. Ch., 375.
Youngs *v.* South Tredegar I. Co., 85 Tenn., 189; 4 Am. St. Rep., 752.

He also acquired a right to participate in the profits of the corporation.

Endlich on Building Associations (2d Ed.), § 469.
Plimpton *v.* Bigelow, 93 N. Y., 592, 599.
Burrall *v.* Bushwick R. Co., 75 N. Y., 211, 216.
People *ex rel.*, Wiebush, &c., Co. *v.* Roberts, 154 N. Y., 101, 107.

Such profits were applicable, in building and loan association parlance, to the purpose of "maturing" his stock, that is, carrying the stock to its face or par value in advance of the time when Ebaugh's mere payment of "dues" upon the stock would mature it.

"When the payments to the Association, together with the distributive profits, after the deduction of expenses, equal the face value of the stock, then the stock is matured; the certificates are then called in and the holder receives the face value thereof in cash, unless he is a borrower of the Association, and in that event his indebtedness is cancelled."

Thompson on Building and Loan Assns. (2d Ed.), § 4, p. 9; see also *Id.*, § 134, p. 258; § 190, p. 378.

SECOND.—Defendant in error, as a part of the privileges incident to his membership in the corporation, acquired not only an undivided interest in the

corporate properties at the corporate *situs*, but also a vested right, at his election, to call for an advance or loan to him of the par or maturity value of his shares.

Bedford *v.* Eastern B. & L. Assn., 181 U. S., 227, 240.
Endlich on Building Associations (2d Ed.), §§ 20, 88.
7 Thompson on Corp., §§ 8724, 8726.

THIRD.—Defendant in error also acquired the privilege, in the nature of a vested right, of withdrawing his contributions to the capital stock of the plaintiff in error, subject only to the limitations placed on such withdrawal by the laws of New York and the corporate charter and by-laws.

Englehardt *v.* Fifth Ward Assn., 148 N. Y., 281.

FOURTH.—The transaction between the defendant in error and the plaintiff in error was a purchase by the defendant in error of an undivided share or interest in the properties of the plaintiff in error, consummated through the medium of a subscription made in writing and transmitted through the United States mails, and the issue of a certificate of stock representing the interest acquired by the defendant in error in the plaintiff in error and its transmission and delivery, through the United States mails, to the defendant in error at the place of his citizenship and residence in the State of South Carolina.

Ante, pp. 17, 42, 43.
Transcript, pp. 10, 11 and 12.

For this stock certificate, itself an instrument of commerce, and representing a transferable interest in the capital stock of the plaintiff in error, the defendant in error made certain payments in money, which were transmitted by mail to the home office of the corporation in Syracuse, New York, and the contract of the defendant in error was that he

would continue to make such payments at the rate of seventy-five cents per month per share until the stock should attain its par value.

Ante, p. 43.
Transcript, pp. 11 and 12.

The stock certificate, by its terms, provides that "all payments under this certificate are payable at the home office of the association at Syracuse"; it also provides that the by-laws of the corporation, "which are attached to and endorsed hereon, are a part of this contract, and such by-laws and this certificate shall be construed together as part of the contract between the association and the shareholder."

Stock Certificate, Transcript, p. 11.

It seems to be settled law that a contract to subscribe for the stock of a foreign corporation is a contract to be performed at the corporate *situs*.

Penobscot, &c., R. R. Co. *v.* Bartlett,
12 Gray (Mass.), 244.

Hence we insist that the application and subscription for stock in the plaintiff in error and the transmission of the money for the first payments of dues or calls upon such stock, together with the issuance of the stock certificate and its transmission to the defendant in error at his residence in South Carolina, constituted a transaction that is necessarily interstate commerce, involving not only an exchange of the instruments of commerce as between the parties but an actual sale of certain property interests in the capital stock of the plaintiff in error to the defendant in error for a consideration payable in money. Is not such a transaction as this, between a corporation of New York and its stockholder in South Carolina, involving traffic in the corporate stock and a transfer of negotiable securities for money, when consummated in the manner that this transaction was, interstate com-

merce within the meaning of the Federal Constitution?

It is settled law that the business of transmitting telegraphic messages between the States is protected by the "commerce clause" of the Constitution, such messages being regarded as instruments of commerce and consequently not subject to State control.

LeLoup *v.* Port of Mobile, 127 U. S., 610, 645.
Telegraph Co. *v.* Texas, 105 U. S., 460.
Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S., 1.

It is equally well settled that no State can impose any conditions on the transaction of interstate commerce within such State.

Chy Lung *v.* Freeman, 92 U. S., 275.
New York *v.* Compagnie, etc., 107 U. S., 59.
Henderson *v.* The Mayor, 92 U. S., 259.
Brown *v.* Maryland, 12 Wh., 419.
Fritts *v.* Palmer, 132 U. S., 282.
Holder *v.* Aultman, 169 U. S., 81.

Nor can it, by any State action, executive, legislative or judicial, prevent a corporation of another State from transacting with its citizens business which of itself is commerce.

Cooper Mfg. Co. *v.* Ferguson, 113 U. S., 727, 736.
Crutcher *v.* Kentucky, 141 U. S., 47.
Steamship Co. *v.* Pennsylvania, 122 U. S., 326.
Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196.
Railroad Co. *v.* Husen, 95 U. S., 465–470.
Sherlock *v.* Alling, 93 U. S., 99, 103.

Assuming the transaction here in question to be a matter of interstate commerce, it must necessarily

involve a question arising under the Constitution and laws of the United States which will confer jurisdiction upon this Court to consider the case on its merits upon this writ of error to the Supreme Court of South Carolina.

W. U. Tel. Co. *v.* Call Pub. Co., 181 U. S., 92, 100, 101.

Columbia Water Power Co. *v.* Columbia Electric St. R., &c., Co., 177 U. S., 475.

In a recent case involving the construction of a statute of Pennsylvania, rendering void contracts of foreign corporations "doing business" in Pennsylvania without compliance with the statute, it was held by the Supreme Court of Pennsylvania, reversing the decision of the lower courts of that State, that the transactions by which a citizen of Pennsylvania became a member of and secured an advance from a New York Building and Loan Association was not the doing of business within that State, but was a transaction in the nature of interstate commerce, and the Supreme Court of Pennsylvania distinguishes a case holding that insurance contracts are not interstate commerce from the transaction by which a citizen of Pennsylvania becomes a member of a New York Building and Loan Association and secures an advance therefrom. Mr. Justice Potter, delivering the opinion of the Court upon this point said:

"Great reliance seems to have been placed upon the case of *Swing* v. *Munson* (191 Pa., 582), as sustaining the position of the appellee, but the question there was entirely different from that now under consideration. It did not involve the construction of the Act of 1874. The question was as to the right to solicit and take insurance within the State without complying with the stringent provisions of the Act of April 4, 1873. Insurance cases stand upon a basis of their own. The business of insur-

ance has been held not to be commerce, as an insurance policy has been defined merely as a contract of indemnity, and for this reason not protected as interstate commerce. The case of *Swing* v. *Munson* can therefore have no application to the question in hand."

People's B. L. & S. Assn. *vs.* Berlin, Supreme Court of Pennsylvania, Nov. 8th, 1901. Not yet reported.

There is no pretense in the case at bar that the plaintiff in error was "doing business" in the State of South Carolina in violation of any law of that State, and it must be clear that the transaction between the parties was not a matter of contract in the State of South Carolina, but on the contrary, that the contract was one made through the mails and to be performed exclusively in the State of New York.

Bedford *v.* Eastern B. & L. Assn., 181 U. S., 227.

It would also seem that the purchase of stock in a corporation of another State, even though it is done through a soliciting agent in the State of the residence of the purchaser, is not doing business in that State within the contemplation of its laws, but is a transaction of commerce between the States.

Payson *v.* Withers, 5 Biss., 272; Opinion per Gresham, *J.*

"Doubts may at one time have existed upon the subject, but it is now well settled that a State law cannot discharge or suspend the obligation of a contract made in another State if it was legal where it was made and was a contract with a citizen of another State, not even if it was to be performed in the State whose law is invoked to defeat the remedy."

Clifford, Justice, in Green *v.* Collins, 3 Cliff., 494; s. c., Fed. Cas. No. 5755.

In the light of these principles and authorities, we respectfully invoke the opinion of this Court as to whether or not the transaction between the defendant in error, Ebaugh, and the plaintiff in error, Eastern Building and Loan Association, does not constitute commerce between the States within the meaning of the Federal Constitution, and if thereby jurisdiction is not conferred upon this Court to review the judgment of the Supreme Court of South Carolina in the case at bar.

V.

BUT IT IS CONTENDED IN THE BRIEF IN SUPPORT OF THE MOTION TO DISMISS THAT NO FEDERAL QUESTION ARISES IN THIS CASE BECAUSE THE SUPREME COURT OF SOUTH CAROLINA DID NOT REST ITS DECISION UPON THE *express* DENIAL OF "FULL FAITH AND CREDIT" TO THE LAWS OF NEW YORK AS IT DID IN THE *Welling* CASE (*ante*, pp. 2 and 3).

We meet this contention with the following propositions:

The judgment of the Supreme Court of South Carolina in favor of the defendant in error could not have been rendered if the contract obligations of defendant in error as a *stockholder* in the Eastern Building and Loan Association had been determined in accordance with the laws and judicial decisions of New York as they would have been in the courts of New York.

The test of compliance with the rule of constitutional obligation that full faith and credit shall be given in each State to the laws of every other State, is that the same effect shall be given to them that

would be given to them by the courts of such other State.

Chicago, &c., R. R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615.

There is no pretense in the opinion of the Supreme Court of South Carolina—or if there is, it is a *mere pretense*—that under the New York Act of 1851 and the articles of incorporation and by-laws of the Eastern Building and Loan Association, defendant in error was entitled to receive from the association the full par value of his stock before the actual maturity of the stock.

That Court accepts the pitiful evasion of the Referee and the Court below, that because the courts of New York have held in several cases that a corporation cannot avail itself of the plea of *ultra vires* as against a contract which has been performed in good faith by the other party, therefore a *stockholder* in a corporation is entitled to withdraw his contribution to the capital stock in direct violation of the corporate charter and the law under which the corporation was organized, merely because the *estimated* period of stock maturity has expired.

Transcript, pp. 64, 67.

This must rest upon the doctrine that a corporation of a purely mutual character can bind itself in violation of its charter powers by a guaranty that its stock shall have a certain value at a certain time, or earn a certain rate of dividends.

Yet nothing is better settled than that corporations cannot bind themselves by such guaranties and that dividends can be paid only from profits,

1 Morawetz on Corp. (2d Ed.), §§ 444, 457.

Mobile, etc., R. Co. *v.* Tennessee, 153 U. S., 486, 496.

New York, etc., R. Co. *v.* Nickals, 119 U. S., 296, 305, 306.

Elevator Co. *v.* Memphis, etc., R. Co., 85 Tenn., 703; s. c., 4 Am. St. Rep., 798.

2 Thompson on Corp., § 2152.

And this is particularly true of building and loan associations because of their strictly mutual character.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.

Miller *v.* Eastern B. & L. Assn. (Tenn.), 53 S. W. Rep., 231.

King *v.* International Bldg., etc., Union, 170 Ill., 135.

So the statute of New York, under which plaintiff in error is organized, expressly forbids the declaration or payment of any dividends to shareholders except from the earnings of the association.

"§ 7. The trustees of any association formed under the provisions of this act may, from time to time, declare dividends *from the earnings* of the association, payable in such manner as may be provided in the articles of association; *but no dividend shall be declared except from the earnings of the association.*"

Laws of N. Y., 1875, Ch. 564, § 1, amending Laws of N. Y., 1851, Ch. 122, § 7; Transcript, p.

This leaves nothing for "construction" or "interpretation" so far as the contract between plaintiff in error and defendant in error, as a stockholder, is concerned.

But the Supreme Court of South Carolina says: "Both the Master and Circuit Judge find as matter of fact that the laws of New York do not forbid the defendant from entering into an agreement by which the shares would mature in a definite time" (Transcript, p. 67), and the Court adds that such finding is conclusive. Yet there is not a "scintilla"

of evidence in the record upon which such a finding *as a finding of fact* can be based, all the *evidence* being directly and conclusively to the contrary.

Ante, p. 4 *et sq.*

And it is settled law that when statutes and judicial decisions of another State are given in evidence, the question of their effect and meaning is one of law, not of fact.

Thomson-Houston Co. *v.* Palmer, 52 Minn., 174; 38 Am. St. Rep., 536.
Kline *v.* Baker, 99 Mass., 255.

However, the Supreme Court of South Carolina confutes itself and confounds its own logic by citing three New York cases which were offered in evidence by the plaintiff below (defendant in error) as constituting "the only evidence" on this point. Those cases are: *Whitney Arms Co.* v. *Barlow*, 63 N. Y., 62; *DeGraff* v. *American Linen Thread Co.*, 21 N. Y., 124; *Diamond Match Co.* v. *Roeber*, 106 N. Y., 473.

We commend these cases to the careful examination of this Court. They are, by the South Carolina Court, supposed to *prove* that a stockholder in a mutual corporation can withdraw from the capital of the corporation more than he has contributed thereto, and more than his profits, and thereby force the corporation to guarantee the maturity of his stock and a fixed rate of interest upon it in violation of the express provisions of the New York law and of the corporate charter and by-laws!

The case of *DeGraff Linen Thread Company* was that of a sale by a corporation to an outside party dealing with the corporation at arm's length, and the corporation having received the *full consideration* was not permitted to rely upon its lack of authority. No question of an attempt to guarantee profits to a stockholder was involved, nor did the plaintiff there seek to recover from the corporation

something for which he had given *no consideration*, as in the case at bar.

Whitney Arms Co. v. *Barlow* is still less in point, as it merely lays down the rule that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been in good faith fully performed by the other party. No question between stockholder and corporation was involved, none as to the right to guarantee the value of stock or its rate of earnings.

The case of *Diamond Watch Co.* v. *Roeber* is equally beside the mark, involving as it does a contract in restraint of trade and a branch of the doctrine of estoppel.

No question between stockholder and corporation exists in either of these three cases. How these three cases could prove as *matter of fact* what the Supreme Court of South Carolina says they do, is beyond ordinary comprehension.

On the other hand, the law of New York upon the question of the charter powers of plaintiff in error and the contract rights of defendant in error as a stockholder in the association was proven by undisputed evidence in direct conformity with the rule laid down by this Court in the *Wiggins Ferry* case.

> *Ante*, pp. 4, 5, 12, 13, 14, 15, 17.
> Chicago, &c., R. R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615.

The Supreme Court of South Carolina will not be permitted to ignore this undisputed proof upon the very point in issue and under the guise of "construing" a contract not only impair the obligation of the contract but deprive plaintiff in error of its property and refuse to give *any* faith or *any* credit to the express provisions of the statutes of New York and the plain, unequivocal decisions of the courts of New York applying and interpreting those statutes. It has been well said by one of the great Judges of this Court: "We shall never immolate truth, justice and

the law because a State tribunal has erected the altar and decreed the sacrifice."

Swayne, *J.*, in Gelpecke *v.* Dubuque, 1 Wall., 175, 206.

The entire contention of counsel for defendant in error in support of the motion to dismiss or affirm is really embodied in the following quotation from their brief:

"The statutes introduced in evidence by the defendant do not, in express terms, forbid building and loan associations from making such contracts as that made with Ebaugh. The conclusion that such contracts are forbidden by these statutes can be reached only by construction. Mere errors in the construction of the statute of another State furnishes no basis for a federal question."

Brief for Defendant in Error in support of Motion, p. 5.

Later on they insist that "reference to the proceedings in the State courts in the case at bar will conclusively show that the validity of the New York statutes was not denied, and that the error, if any, was in their construction."

Brief for Defendant in Error, p. 6.

They then quote the Referee's report in the trial Court to prove their contention.

Brief for Defendant in Error, pp. 6 and 7.

By the quotation made it appears that the learned Referee satisfied his conscience and "construed" the laws of New York by saying: "I do not see why such an association may not issue stock *to be fully paid up* (the italics are ours) by seventy-eight monthly payments and to be redeemed at par at the end of that time."

Brief for Defendant in Error, p. 7.

Neither do we see why seventy-eight monthly payments that *fully paid* up the stock would not mature it!

But that is not the question here, either as one of "construction" or otherwise.

The point is that seventy-eight monthly payments of *seventy-five cents per month* do not amount to one hundred dollars, but only to *fifty-eight dollars and fifty cents!* Hence the stock has not matured unless the "dividends" credited from profits are sufficient to mature it—that is to carry it to its par value—and in the case at bar the *undisputed* evidence was that the stock had not attained its maturity value.

Transcript, p. 16, evidence of D. W. Ebaugh.

Transcript, pp. 43, 44, 45, 46, evidence of N. C. Visscher.

That he had only made seventy-eight monthly payments of seventy-five cents each upon each share, defendant in error admits in the complaint filed by him as plaintiff below.

Transcript, pp. 2 and 3; Paragraphs V., VI. and VII.

The answer of the defendant corporation denied that the stock had matured.

Transcript, pp. 6-9, Paragraphs "Fifth," "Seventh," "Eighth" and "Twelfth."

Defendant in error, as plaintiff below, offered no evidence of the maturity of the stock, and the evidence for plaintiff in error, as defendant below, affirmatively proved that it had not matured.

Hence the "conclusion" of the Referee, as above quoted, is either beside the mark or a mere pretext upon which to deprive plaintiff in error of its property and to refuse to give full faith and credit to the laws of New York.

The laws of New York were not "construed," they were ignored.

The only question was whether the *undisputed* laws of New York and the plain provisions of the New York statutes should be held to govern the case, or whether it should be decided as it was in the Welling case, that: "*Whatever may be the laws of New York, we do not think they should be enforced in this State.*"

Ante, p. 7.

The decision of the Supreme Court of South Carolina was that the statutes and decisions of New York should not be given full faith and credit, but that *on the pretense of "construction" the "federal question" should be eliminated, if possible.*

That it has not been and cannot be so eliminated is manifest upon the face of the New York statutes, the plain meaning of which, even though there were not, as there are, half a score of New York cases so construing them, is that defendant in error cannot recover the par value of his stock until it has become matured,—that is, fully paid,—either by his payments of "dues" or "calls" at the rate of seventy-five cents per month, or by such payment plus a *pro rata* share of the profits, credited as dividends.

There was expert testimony as to the laws of New York and their construction by the Courts of New York upon this point, and that evidence was not rebutted or impeached in any way.

Transcript, p. 42, Evidence of D. A. Pierce.

Such evidence was corroborated by the giving in evidence of a case decided by the General Term of the Supreme Court of New York, and is conclusive.

O'Malley *v.* People's B. & L. Assn., 92 Hun (N. Y.), 572; Transcript, p. 38.

Chapter 122 of the Laws of New York of 1851 expressly provides that: "It shall be lawful for the

trustees to call in and demand from the stockholders, respectively, all such sums of money by them subscribed, at such times and in such payments or installments as the articles of association shall prescribe."

Transcript, p. 32, paragraph 4.

The articles of incorporation of the association accordingly provide that: "The monthly dues per share shall be seventy-five cents."

Transcript, p. 50.

And the by-laws contain the following provisions on the same subject:

Sec. 13. Each share of stock shall be charged with any and all amounts that may be owing from the shareholder or his assigns to the association, whether as dues, loans, fines, interest or premiums, and all certificates of stock in said association shall, whether mentioned therein or not, be subject to a lien thereon, to secure any such indebtedness, and the right to deduct and withhold the amount of any such indebtedness is hereby expressly reserved to the association.

Sec. 14. *All shareholders shall pay, or cause to be paid, a monthly instalment of seventy-five cents on each share named in their certificate, until the same shall be fully paid;* said instalment to be paid to the association on or before the last Saturday of each month. Shareholders are required to pay monthly instalments without notice.

Transcript, p. 60, By-laws, Art. XIV., §§ 13 and 14.

There is no "construction" needed. The language is plain and unequivocal.

After his seventy-eight seventy-five cents per share monthly payments had been made defendant in error was notified by the association that his shares had not matured, and that he must either continue

his monthly payments until maturity or withdraw his stock at its withdrawal value.

Transcript, p. 46.

See also: Transcript, pp. 44, 45; Letter of C. A. Pooler, Secy., to D. W. Ebaugh.

Defendant in error refused to continue his payments or to accept the withdrawal value of the stock and brought his action in the State court to recover the par value of his stock, although such stock was only a little more than half paid in. Had his demand for payment in full been complied with the directors of the association would have been violating the express and unequivocal provisions of the two New York statutes under which the association was incorporated.

Laws of N. Y., 1851, Ch. 122, § 7, Transcript, p. 32; as amended,

Laws of N. Y., 1875, Ch. 564, § 1, Transcript, pp. 35 and 36.

Taking these several provisions of the statutes of New York and the articles of incorporation and by-laws of plaintiff in error into consideration, it will be seen that they repeatedly provide that a stockholder must pay his monthly payments until his stock reaches its par value, and that if he withdraws before maturity, he can only have the withdrawal and not the par value of the stock, and such withdrawal value is limited to "the amount of the monthly instalments that have been paid with such additional interest (dividends), if any, as the by-laws may provide, *except that the same shall not exceed the net earnings of the stock.*"

Transcript, p. 51, Articles of incorporation, ¶ XII.

The by-law provisions relating to withdrawals contain like limitations.

Transcript, p. 60, By-Laws, Art. XIV., §§ 18 and 19.

In the light of these statutory provisions and the terms of the articles of association and by-laws of plaintiff in error conforming to them, is it not manifest, that in requiring payment to defendant in error of the par value of his stock, the Supreme Court of South Carolina did not content itself with "construing" the contract and the laws of New York, but instead impaired the obligation of the contract, denied the plaintiff in error the equal protection of the laws, deprived it of its property, without due process of law, and necessarily and directly refused to give "full faith and credit" to the laws of New York?

VI.

THE EXISTENCE OF "A FEDERAL QUESTION" IN THIS CASE, HAS, WE THINK, BEEN DEMONSTRATED.

WE SUBMIT THAT THE FEDERAL QUESTIONS SO SHOWN BY THE RECORD WERE FULLY RAISED AND PRESENTED IN THE STATE COURT; THAT THE DECISION OF THE SUPREME COURT OF SOUTH CAROLINA WAS AGAINST THE CONSTITUTIONAL RIGHTS CLAIMED BY PLAINTIFF IN ERROR, AND THAT, THEREFORE, THIS CASE WAS PROPERLY BROUGHT TO THIS COURT BY WRIT OF ERROR.

"But the true and rational rule is, that the Court must be able to see clearly, from the whole record, that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him is denied."

Bridge Proprietors *v.* Hoboken Co., 1 Wall., 116, 143.

"We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

Chapman *v.* Goodnow, 123 U. S., 540, 548.

Roby *v.* Colehour, 146 U. S., 153.

Dewey *v.* Des Moines, 173 U. S., 193, 199.

Keokuk, &c., Bridge Co. *v.* Illinois, 175 U. S., 626, 634.

It has already been pointed out that the "Federal questions" were specifically raised in the Court below; relied upon there, and by that Court decided adversely "by necessary intendment" to the claims of plaintiff in error.

And where the Federal question was necessarily raised and must have been decided adversely to the claim of plaintiff in error this Court will not dismiss the writ of error.

Eureka Lake, &c., Company *v.* Superior Court, 116 U. S., 410.

Des Moines, &c., Co. *v.* Iowa Homestead Co., 123 U. S., 552.

Green *v.* Van Buskirk, 5 Wall., 307.

This brings us to a discussion of the merits of this case in so far as the mutual rights and obligations of the parties are concerned, and in order to ascertain these we must first look into the nature of the Eastern Building and Loan Association, and then see what its contract relations with its members are under the laws of New York.

VII.

UNDER THE LAWS OF NEW YORK, PLAINTIFF IN ERROR IS A PURELY MUTUAL CORPORATION, WHOSE STOCKHOLDERS HAVE EQUAL, MUTUAL AND RECIPROCAL RIGHTS, DUTIES AND OBLIGATIONS, AND NO ONE OF WHOM CAN LEGALLY BE ACCORDED, IN THE STATE OF NEW YORK, ANY ADVANTAGE, PREFERENCE OR PRIORITY OVER ANOTHER.

Ch. 122, Laws of N. Y., 1851, Transcript, pp. 31–35.

Englehardt *v.* Fifth Ward Assn., 148 N. Y., 281.

People *v.* Lowe, 117 N. Y., 175, 180.

Tindall, *C. J.*, in Silver *v.* Barnes, 6 Bing. N. C., 180; 8 Scott, 300; 37 Eng. Com. L., 335.

Robertson *v.* Homestead Assn., 10 Md., 397; s. c., 69 Am. Dec., 145.

Tilley *v.* Am. B. & L. Assn., 52 Fed. Rep., 618, 622.

Thompson on Building Associations (2d Ed.), §§ 3, 4.

"A mutual savings fund and loan association is purely a co-operative society, consisting of a partnership in the profits of money as a money maker, equitably distributed in proportion to the severalties of capital furnished by the individual members thereof."

Wrigley on Building Associations, p. 16.

VIII.

THE ARTICLES OF INCORPORATION AND BY-LAWS AND THE PROVISIONS OF CHAPTER 122 OF THE NEW YORK LAWS OF 1851, AND CHAPTER 564 OF THE NEW YORK LAWS OF 1875, ARE THE TEST OF THE RIGHTS AND OBLIGATIONS OF THE STOCKHOLDERS OF THE ASSOCIATION, AND BY THEM THE CONTRACT OF MEMBERSHIP MUST BE CONSTRUED, NOT ONLY IN NEW YORK BUT IN EVERY STATE OF THE UNION WHERE THE COURTS MAY BE CALLED UPON TO INTERPRET THE CONTRACT OF MEMBERSHIP.

Const. U. S., Art. IV., § 1.
Relfe *v.* Rundle, 103 U. S., 222, 225, 226.
Canada Southern Ry. *v.* Gebhard, 109 U. S., 527, 537.
Englehardt *v.* Fifth Ward Assn., 148 N. Y., 281.
Chase *v.* Curtis, 113 U. S., 452, 458.
Young *v.* Wempe, 46 Fed. Rep , 354.
Payson *v.* Withers, 5 Biss. (U. S.), 269, 278.
3 Thompson on Corp., § 3046.

And so it has been held by the courts of several States with reference to membership contracts between plaintiff in error and its stockholders.

Bennett *v.* Eastern B. & L. Assn., 177 Pa. St., 233; s. c., 55 Am. St. Rep., 723.
Miller *v.* Eastern B. & L. Assn. (Tenn.), 53 S. W. Rep., 231.
Campbell *v.* Eastern B. & L. Assn. (Va.), 37 S. E. Rep., 350; 98 Va., 729.
Eastern B. & L. Assn. *v.* Snyder (Va.), 37 S. E. Rep., 298; 98 Va., 710.

It is settled law that contracts must be construed by the law of the place of performance.

Coghlan *v.* South Carolina R. R. Co., 142 U. S., 101, 109, 110.

Pritchard *v.* Norton, 106 U. S., 124, 136.

Liverpool, etc., Co. *v.* Phœnix Ins. Co., 129 U. S., 397, 458.

Nor can it be denied that the place of performance of a contract of stock subscription with a corporation is at the corporate *situs*.

Penobscot, etc., R. Co. *v.* Bartlett, 12 Gray (Mass.), 244.

1 Thomp. on Corp., § 1259.

3 Thomp. on Corp., § 3046.

And in the case at bar this obligation is fixed by the terms of the stock certificate which constitutes the cause of action of the defendant in error, one of the express conditions embodied on the certificate being: "All payments under this certificate are payable at home office of the Association at Syracuse, N. Y., within sixty days after the acceptance and approval of satisfactory proofs."

Transcript, p. 11.

Another provision of the Certificate is that, "Any action brought against this association shall be commenced within six months after filing proofs, and in the County of Onondaga and State of New York."

Transcript, p. 12.

This provision has been held by the Supreme Court of Massachusetts to be valid and binding, and consequently a suit brought in the jurisdiction of Massachusetts by a stockholder of a New York building and loan association in whose charter the same clause appeared, was dismissed. In that

case the stockholder was remitted to his remedies in New York.

Daley *v.* People's B., L. & S. Assn. (Mass.), 59 N. E Rep., 452.

The by-laws also provide as follows: "All remittances for advance instalments, premiums, monthly instalments, fines and penalties, interest and premiums and all other payments shall be made to the Secretary of the Association at the Home office."

By-Laws, Art. XIV., § 16, Transcript, p. 60.

IX.

UNDER THE LAWS OF NEW YORK AND THE ARTICLES OF ASSOCIATION AND BY-LAWS OF PLAINTIFF IN ERROR DEFENDANT IN ERROR COULD NOT, IN THE STATE OF NEW YORK, MAINTAIN AN ACTION OR RECOVER UPON HIS CERTIFICATE THE PAR OR MATURITY VALUE THEREOF IN ADVANCE OF THE ACTUAL MATURITY OF THE STOCK.

O'Malley *v.* People's Assn., 92 Hun (N. Y.), 572.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.

Heslin *v.* Eastern B. & L. Assn., 28 Misc. (N. Y.), 376, 378; s. c., affd., 61 App. Div. (N. Y.), 458.

People *v.* Lowe, 117 N. Y., 175.

Englehardt *v.* Fifth Ward Assn., 148 N. Y., 281.

See also the provisions of the Act of 1851 of N. Y. and the Articles of Incorporation and By-Laws of Plaintiff in error, which expressly so provide, *ante*, pp. 13–17.

Transcript, pp. 31–42.

Notwithstanding that such is the settled law of New York, the Supreme Court of South Carolina affirmed the decision of the Court below, giving the defendant in error judgment for the *full par value* of his stock, although it affirmatively appeared by *undisputed evidence* that the law of New York was as here stated, and that the stock had not matured.

Ante, pp. 45 and 46.

In connection with the doctrines already stated in this paragraph, we submit that a building and loan association cannot, by contract, fix the maturity period of its stock so as to *guarantee an estimated rate of profits or earnings*, and that this is settled law not only in New York but in every jurisdiction where the question has directly arisen.

King *v.* International Assn., 170 Ill., 135, 142.

Royal Trust Co. *v.* Culver, 87 Ill. App. Rep., 630.

Bertche *v.* Equitable Loan Assn., 147 Mo., 343.

Schell *v.* Equitable, &c., Assn., 150 Mo., 103.

Province *v.* Interstate B. & L. Assn. (Tenn.), 58 S. W. Rep., 265.

Heslin *v.* Eastern B. & L. Assn., 28 Misc., 376, 378; s. c. affirmed, 61 App. Div., 458.

Eastern B. & L. Assn. *v* Snyder (Va.), 37 S. E. Rep., 298; 98 Va., 710.

We have already seen that the contracts of such associations with their members must be construed in accordance with the laws and judicial decisions of the State of the corporate *situs* and the terms of the corporate charter.

Such is the general doctrine with relation to corporate contracts,

Washington Central Bank *v.* Hume, 128 U. S., 195, 206, 207.
Coghlan *v.* South Carolina R. R. Co., 142 U. S., 101, 109.

Nor can the contention of the defendant in error that he was induced to become a stockholder by representations that the stock would mature in seventy-eight months avail him as against this doctrine.

Upton *v.* Tribilcock, 91 U. S., 45, 50.

X.

THE CASES RELIED UPON BY COUNSEL FOR DEFENDANT IN ERROR ARE NOT IN POINT AND DO NOT ESTABLISH THEIR PROPOSITIONS: (*a*) THAT NO FEDERAL QUESTION IS INVOLVED, OR (*b*) THAT THE DECISION OF THE SUPREME COURT OF SOUTH CAROLINA ONLY INVOLVED THE "CONSTRUCTION" OF THE LAWS OF NEW YORK AND DID NOT DENY TO THEM "FULL FAITH AND CREDIT."

Briefly reviewing the principal cases cited by counsel for defendant in error, we find:

1. The case of *Glenn* v. *Garth* is not in point, because as MR. CHIEF JUSTICE FULLER, who delivered the opinion in that case and granted the writ of error in this one, well says: "*This record may be searched in vain for any proof that, as matter of fact, the public acts of Virginia had, by law or usage in Virginia, any other effect than was given them in New York.*"

Glenn *v.* Garth, 147 U. S., 360, 368.

In the case at bar the evidence to show this as a matter of fact is clear, uncontradicted and conclusive.

Ante, pp. 4 and 5.

2. In *Lloyd* v. *Matthews, the laws of Ohio were not proved as a fact* in the Kentucky court, and, therefore, the Court of Appeals of that State "was obliged to determine the case on the record, *and plaintiff in error had failed to plead the construction given the Ohio Statutes by the courts of Ohio, or to introduce the printed books of cases adjudged in the State of Ohio, or to prove the common law of that State by the parol evidence of persons learned in that law, or to put in evidence the laws of that State as printed under the authority thereof or a certified copy thereof.*" * * * "The Court of Appeals was left, therefore, to construe the parts of the Ohio laws that were pleaded as it would local laws; and it is settled that *under such circumstances*, where the validity of a State law is not drawn in question but merely its construction, no Federal question arises."

Lloyd *v.* Matthews, 155 U. S., 222, 227.

In the case at bar everything that this Court says was not done in the case just cited, to prove the State laws, was done, and proof having been made of the State statutes of New York and their construction by the courts of New York full faith and credit must be given to such statutes and to the New York decisions construing the same.

Hanley *v.* Donoghue, 116 U. S., 1, 3.

"It does not seem to have occurred to the Chief Justice (Taney) that the writ could be maintained upon the ground of a denial of full faith and credit to the Mississippi Statute by the construction given by the Louisiana Court."

Fuller, *C. J.*, in Glenn *v.* Garth, 147 U. S., 369.

3. The case of *Banholzer* v. *New York Life Ins. Company* rests upon the authority of Glenn *v.* Garth and Lloyd *v.* Matthews and clearly was not intended to go beyond the doctrine of those cases. "*The parties mutually agreed* that this should be a New York contract and construed according to the laws of that State. The decisions of the highest Court of that State as to the construction of such a contract and of the statutes of New York must therefore be accepted as conclusive upon the parties." So said the Supreme Court of Minnesota in that case (178 U. S., 406, 407). Later, in a second opinion the Minnesota court reviewed the contention that the case before it was "distinguishable" from the New York case which had been followed in the first opinion; *queried* whether the construction of the New York Statute by the New York court was binding *if the construction of the statute was not necessary to the decision* (Carroll *v.* Carroll, 16 How., 275, 286, 287), and then pretermitted the question so raised, saying: "We shall not decide that question, as we are satisfied that if the construction of the New York statute is to be considered *res integra* the notice required by it was not applicable," &c. (178 U. S., 408). On such a state of facts this Court granting, *arguendo*, that the Supreme Court of Minnesota had erred in its construction of the New York case and the New York statute, yet held, that as the validity of the statute was not denied and its meaning was first sought in a decision of the New York courts, the case fell within the doctrine of *Glenn* v. *Garth* and *Lloyd* v *Matthews, supra.*

Banholzer *v.* New York Life Ins. Co., 178 U. S., 408.

There is no analogy between the *Banholzer case* and the case at bar.

In this case the full faith and credit clause of the Federal Constitution was expressly invoked. It was insisted that under that clause the New York

statutes, and an authority and franchise exercised under them, must be given the same effect given them by the courts of New York. The decision of the Supreme Court of South Carolina, denies them that effect and relies upon the *Welling case* decided by the same Judge, in which it was held that: "Whatever may be the laws of New York, we do not think they should be enforced in this State" (*Ante*, p. 7). Relying upon this doctrine the Supreme Court of South Carolina, say in the case at bar: "We fail to discover any facts causing us to differentiate this case from those hereinbefore mentioned."

Transcript, pp. 67, 68.

It is for this Court to say, and it is its duty under the Constitution to determine, whether in this decision the Supreme Court of South Carolina gave to the laws of New York and the contract made under those laws the same effect that such laws and contract have in the courts of New York.

Green *v.* Van Buskirk, 5 Wall., 307, 311, 314.

Christmas *v.* Russell, 5 Wall., 290, 302.

Mills *v.* Duryee, 7 Cr., 481, 483, 484.

Carpenter *v.* Strange, 141 U. S., 87, 103.

Dupasseur *v.* Rochereau, 21 Wall., 130, 139.

Huntington *v.* Attrill, 146 U. S., 657, 666.

Chicago, &c., R. Co. *v.* Wiggins Ferry Co., 119 U. S., 615, 622, 624.

Chicago, &c., R. Co. *v.* Stevens, 174 U. S., 710.

"It was insisted on the one side, and denied on the other, that the faith and credit which the judicial proceedings in the courts of the State of Illinois had by law and usage in that State, were de-

nied to them by the Supreme Court of New York in the decision which was rendered.

"Whether this was so or not could only be properly considered when the case came to be heard on its merits; but this Court, in denial of the motion to dismiss, held that the Supreme Court of New York necessarily decided *what* effect the attachment proceedings in Illinois had by the law and usage in that State; and as it decided against the effect which Green claimed for them, this Court had jurisdiction under the clause of the Constitution which declares 'that full faith and credit shall be given in each State to the public acts, records and judicial proceedings in every other State,' and the Act of Congress of 1790, which gives to those proceedings the same faith and credit in other States that they have in the State in which they were rendered."

Green *v.* Van Buskirk, 7 Wall., 139, 145.

That the opinion of the Supreme Court of South Carolina in the case at bar denies the claims of the plaintiff in error under the laws of New York, and denies full faith and credit to those laws is manifest upon the face of the opinion.

Transcript, pp. 67 and 68.

That the opinion is itself a part of the record in the case, and, therefore, may be looked to as such is shown by the certificate of the Clerk of the Supreme Court of South Carolina, wherein it is recited: "I do further certify that the opinion rendered by the Court in said case is a part of the record of said case."

Transcript, p. 1.

Hence, this Court may look to the opinion of the Supreme Court of South Carolina, as it does to

opinions in cases coming up from the Supreme Court of Louisiana.

New Orleans Waterworks *v.* Louisiana Sugar Co., 135 U. S., 18, 27.
Eagan *v.* Hart, 165 U. S., 188, 189.
Murdock *v.* Memphis, 20 Wall., 590, 633.

And the federal question having been raised and decided adversely to the contention of plaintiff in error this Court has jurisdiction to determine this case upon its merits and the motion to dismiss or affirm should be denied.

We do not deem it necessary to further review the cases cited by counsel for defendant in error in the effort to show that the Supreme Court of South Carolina did not refuse to be bound by the decisions of the court of last resort of New York.

Brief for Defendant in Error, pp. 8 and 9.

We think it has already been demonstrated that the Supreme Court of South Carolina refused to give full faith and credit to the laws and judicial proceedings of the State of New York.

The plain language of the New York statutes needs no interpretation or construction. Those statutes were merely denied effect by the Supreme Court of South Carolina because that Court regarded itself as not bound "by comity" to give them effect. Thus the rule of constitutional obligation was ignored and the jurisdiction of this Court established.

What the New York law is we have already discussed sufficiently for the purposes of the motion to dismiss. Upon the merits that question will properly call for full consideration by this Court.

Green *v.* Van Buskirk, 5 Wall., 307; s. c., 7 Wall., 139.

Admittedly the *O'Malley case*, relied upon by plaintiff in error, was a direct authority insupport of the

contention of plaintiff in error as to the meaning and effect of the New York law.

Brief for Deft. in Error, p. 8.
Transcript, p. 38; s. c., 92 Hun (N. Y.), 572.

It makes no difference that the O'Malley case was not decided by the court of last resort; it was not appealed from and has recently been followed in New York by the decision of a court that in such a case, when the decision is unanimous, is a court of last resort.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.
Code of Civil Procedure of N. Y. (1900), § 191.

That such decisions are entitled to full faith and credit in the courts of sister States is settled by the decisions of this Court.

Hollinger *v.* Davis, 146 U. S., 314, 319.

Besides, the decisions in the Court of Appeals of New York in the several cases which plaintiff in error gave in evidence upon the trial of the case below, construe the New York Acts of 1851 and 1875, and together with the articles of association and by-laws of plaintiff in error, are conclusive as to the construction and effect of the New York statutes in question in New York.

Concordia Assn. *v.* Read, 93 N. Y., 474.
People *v.* Lowe, 117 N. Y., 175.
Englehardt *v.* Fifth Ward Assn., 148 N. Y., 281.

The question as to what the common law of New York is apart from the statutes under consideration, does not arise in this case and hence we shall not follow counsel for defendant in error in their discussion on that subject.

Brief for Defendant in Error, pp. 10–12.

Having, as we believe, established the existence of several Federal questions, both expressly raised and necessarily appearing upon the face of the record in this case, we now ask that the motion to dismiss or affirm, heretofore filed, be denied, and that the judgment of the Supreme Court of South Carolina be in all things reversed.

Respectfully submitted,

WM. HEPBURN RUSSELL,
WM. BEVERLY WINSLOW,
Counsel for Plaintiff in Error.

DANIEL A. PIERCE,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 177.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y., Plaintiff in Error, vs. DAVID W. EBAUGH, Defendant in Error.	In Error to the Supreme Court of the State of South Carolina.

Petition for Rehearing.

Now comes the Eastern Building and Loan Association, plaintiff in error, and respectfully moves and petitions this Honorable Court for a rehearing of the above entitled cause for the following reasons, to wit:

I.

Because the Court in its opinion handed down in this case upon April 7, 1902, erroneously holds and decides that the finding of the Referee in the Court of Common Pleas of South Carolina interpreting and construing the Laws of New York and the Articles of Association and By-Laws of the Eastern Building and Loan Association was a finding of fact and, as such, conclusive and binding upon this Court as to the Laws of New York, when as a matter of law and upon authority it should be held:

(*a.*) That the construction by the said Referee of the Statutes, Laws and Judicial Decisions of New

York, proven as facts by undisputed evidence in the case, was a mere conclusion of law, based upon undisputed documentary evidence and not in any sense binding upon the Courts of South Carolina or upon this Court.

(*b.*) That any construction by the Referee in the trial Court, or by the Courts of South Carolina, of the Laws of New York, proven as undisputed facts by undisputed evidence in the trial Court, must conform to and be in harmony with the construction of said laws by the Courts of New York in order to comply with the requirements of Article IV., Section 1 of the Constitution of the United States.

II.

Because the Court in its opinion herein falls into manifest error in this, that it confuses the distinction between facts that must be proven as such in the State Court, and which were proven as such by the undisputed and uncontradicted evidence in this case, and matters of law; that is, mere legal conclusions based upon such facts and which are reviewable in this Court.

III.

Because it appears from the record that the Laws of New York were proven as facts by undisputed evidence upon the trial of the case in the Court of Common Pleas of South Carolina, and that the only pretended finding of fact by the Referee as to such laws was a conclusion of law and not a finding of fact, being merely his construction of the Laws of New York; and because such a construction of a State Law proven as a fact is not a finding of fact but a mere legal conclusion not binding upon this Court.

IV.

Because although it is the undisputed law that what was matter of fact in the State Court is mat-

ter of fact in this Court upon a writ of error to the State Court, yet this does not justify and will not sustain as being matter of fact the mere construction by the State Court of the Laws of New York, such Laws having been proven as facts and not being disputed by any testimony in the trial Court, and there being no finding that they are not facts as so proven.

V.

Because the Court in its opinion herein confuses the necessity of proving as facts the Laws of New York in the Courts of South Carolina, which necessity we concede and which proof was made by undisputed evidence, with the attempt of the Referee of the South Carolina Court to make it appear that his construction of the Laws of New York was a finding of fact, when, as a matter of law, such finding was a mere conclusion of law based upon undisputed documentary evidence, and not a finding of fact in any sense whatever.

VI.

Because the Court in its opinion falls into error in the application of the doctrine laid down by Chief Justice Waite in Chicago & Alton Railroad *v.* Wiggins Ferry Co. (119 U. S., 615), overlooking the fact that the Laws of New York were proven as facts in the case at bar by undisputed evidence, and that the Wiggins Ferry case gives no countenance to the doctrine that the construction of such laws by the trial Court after they have been proven, is a finding of fact binding upon this Court.

We respectfully submit that a leading English case will make clear to the Court the difference between a finding of fact and a conclusion of law in the matter of foreign laws forming an integral part of a contract calling for enforcement (Copin *v.* Adamson, 9 L. R. Exch., 345; 31 L. T. (N. S.), 242; 43 L. J. Exch., 161).

VII.

We most respectfully submit that this petition is not filed merely as a matter of form, but because we believe that the opinion of the Court herein is erroneous in point of law and in contravention of the plain meaning and intent of Article IV., Section 1, of the Constitution of the United States.

We therefore submit a brief and argument in support of this petition, and earnestly ask that this Court, and the able and impartial Justice thereof who delivered the opinion of the Court, give to such brief and argument full consideration, and, if compatible with the justice of the case, direct a reargument upon the question whether or not the finding of the Referee in the Court of Common Pleas of South Carolina was a finding of fact binding upon this Court, or a mere conclusion of law erroneously designated as a finding of fact and not binding upon this Court for any purpose whatsoever.

And your petitioner prays that an order may be made for a rehearing of the argument in this case on a day to be appointed and at a time set by the Court upon the point above stated, and upon such other points as the Court may direct.

Respectfully submitted,

WM. HEPBURN RUSSELL,
WM. BEVERLY WINSLOW,
Counsel for Plaintiff in Error.

I hereby certify that this petition for a rehearing is presented in good faith, and that I believe it is based on meritorious grounds.

WM. HEPBURN RUSSELL,
Counsel for Petitioner.

BRIEF AND ARGUMENT.

In support of the foregoing petition for a rehearing in this case, we submit the following brief and argument, and earnestly request the full and careful consideration thereof by this Honorable Court.

I.—This Court, in its opinion, rests its decision on the proposition that the plaintiff in error, by its agents and its circulars induced defendant in error to become a stockholder upon the representation that the stock would mature (that is, attain its par value of $100 per share) in 78 months upon 78 payments of seventy-five cents per share per month, and that the Referee and the South Carolina Court of Common Pleas found *as matter of fact* that the law of New York did not prevent the making and enforcement of such a contract of membership as between the corporation and its members. Therefore, says this Court, what was matter of fact in the Court below is matter of fact here, and this Court holds itself bound by the alleged findings of fact in the State Court, and hence the judgment is affirmed. The exact language of the opinion on this point is as follows:

"It will be observed, therefore, that the case was presented to the Supreme Court of South Carolina with the facts found by the trial Court as follows: (1) that the plaintiff in error had made a positive promise that the stock of defendant in error would mature in seventy-eight weeks (*sic*) (months); (2) under the assurance of that promise the defendant had subscribed for the stock and had performed in good faith all obligations on his part; (3) under such circumstances it was the law of New York that plaintiff in error could not be heard to say that its promise was *ultra vires*. And the Court decided that such findings of fact were conclusive upon it. The case is presented here under like conditions. This is a writ of error to the State court, and whatever was a question of fact there is a question of fact here."

We concede that if the finding of the Referee and of the trial Judge below is *a finding of fact upon a matter on which there was a conflict of testimony*, then the finding was conclusive upon the Supreme Court of South Carolina and is conclusive in this Court.

But, on the other hand, we insist that if it is shown by the record that the law of New York was proven by undisputed evidence, that there was no question *as matter of fact* as to what the law of New York so proven was; that no question involving the doctrines of *ultra vires* was necessary to the decision of the case, and that the alleged finding of fact by the Referee was a mere construction of certain New York decisions relating to the doctrine of *ultra vires* as matter of law and not of fact, then this Court is not bound by such finding merely because it was denominated in the Court below a "finding of fact."

That the record shows the finding to have been a mere conclusion of law and not a finding of fact, is, we submit, a matter of absolute demonstration. The *statutes* of New York under which the complainant in error was incorporated were given in evidence, and no denial was made that they were the statutes of New York governing such corporations as the Eastern Building and Loan Association (Record, p. 26, par. 37; also Rec., pp. 31–38). If there had been, it would have been a question of law, not of fact A question for the Court not the Referee.

Post *v.* Supervisors, 105 U. S., 667.

There was no evidence to contradict these statutes and not a single decision construing them was offered in evidence by defendant in error. The only decisions offered relating to these statutes and to corporations like the plaintiff in error organized under them were the decisions given in evidence by the plaintiff in error, and the language, meaning and effect of which as to the New York law are beyond question or controversy. Hence there was no conflict of evidence

as to the law of New York governing building and loan associations and their stockholders. Plaintiff in error produced oral testimony showing the construction of these statutes by the courts of New York (Rec., pp. 41, 42), and no contradictory or conflicting evidence was offered by the defendant in error. Plaintiff in error also offered in evidence certain decisions of the courts of New York construing these statutes, fixing the rights of building and loan associations and their members under the laws of New York (Rec., pp. 38–41; also Rec., p. 15, par. 21). These decisions were *O'Malley* v. *People's Building, Loan and Savings Assn.*, 92 Hun, N. Y., 572; *Englehardt* v. *Fifth Ward Assn.*, 148 N. Y., 281; *People* v. *Lowe*, 117 N. Y., 175; *Concordia Assn.* v. *Read*, 93 N. Y., 474.

There was no pretense that these decisions had been denied, reversed or overruled. No decisions in conflict with them were offered in evidence by the defendant in error. Therefore, the law of New York, as established by the terms of the Acts of 1851 and 1875, and as construed by the cases above referred to, was not disputed or contradicted by any evidence given in the case, but was and is conclusively proven as a fact by undisputed testimony, and so much even the finding of the Referee in the Court of Common Pleas of South Carolina concedes (Rec., pp. 26, 27). These statutes and these cases relate to building and loan associations and their relations with their members, and fix and settle the New York law beyond question, doubt or difficulty so far as the relative rights and obligations of such associations and their members are concerned.

Defendant in error, as we have stated, offered no evidence in conflict with these statutes or decisions, but did offer and give in evidence three decisions of the Court of Appeals of New York having no bearing whatever on the New York statutes given in evidence, or upon the law of New York as to the status of building and loan associations and their members. The decisions so given in evidence by

the defendant in error were *Whitney Arms Co* v. *Barlow*, 63 N. Y., 62; *DeGraaf* v. *American Linen Thread Co.*, 21 N. Y., 124; *Diamond Match Co.* v. *Roeber*, 106 N. Y., 473. These cases bear entirely upon the doctrines of *ultra vires* in relation to corporate contracts made with persons dealing with the corporation at arm's length. They do not even remotely bear on the relations of members of a purely mutual corporation to each other and to the corporation. They do not touch or affect the contract of corporate membership, nor attempt to apply the doctrines of *ultra vires* thereto. We reviewed these cases in detail in our original brief in this case, and to that discussion we venture to again refer the Court (Brief for plaintiff in error, pp. 71–72). We insist that an examination of these cases will show that they prove absolutely nothing as a *matter of fact* upon any issue in this case and that as matter of law they have no bearing upon it. The only finding of the Referee in the trial Court based on these cases is contained in the following paragraph, which we quote from the Referee's findings:

"I find as a matter of fact that the law of New York is that where a corporation enters into a contract that is in excess of its charter powers or is unauthorized by law, it will, nevertheless, be bound to perform its agreement as contained in the contract if it suffers the other party to perform his agreement and receives the benefits and retains them" (Rec., pp. 25, 26).

We do not deny the elementary legal doctrine thus found as a fact by the learned Referee. But, what bearing has such a finding, whether of law or fact, upon the issues in the case at bar?

It seems that this Court, like the courts of South Carolina, has overlooked and misconceived the only point in controversy. That point is, whether or not a stockholder in a purely mutual corporation can withdraw more than his *pro rata* share of the

capital stock and more than he has contributed thereto when there are no profits out of which such surplus can be paid, and when he himself has been for years a constituent part of the corporation, exercising all the rights of membership and with no equities superior to those of other members. This is not a question of *ultra vires*. It is a question of the meaning and effect of the corporate charter and by-laws, the statutes of New York regulating such corporations, and the duties and obligations of the corporate members. The law of New York upon this question was proven by undisputed testimony, and there is no finding of fact in conflict with that testimony. No "finding of fact" by a referee in South Carolina can have any bearing upon the unequivocal language of the governing statutes and the undeniable meaning of the decisions which construe them.

It is certainly a novel proposition that a statute, and decisions construing that statute, having been given in evidence and not being disputed, that the construction of such statute by a referee in the trial Court is a finding of fact binding upon the Appellate Courts, and consequently binding upon this Court on a writ of error.

The findings of fact by the Referee to the effect that the association promised to pay the defendant in error $100 per share upon his stock at the expiration of seventy-eight months, and that he relied upon this promise, is not a finding that involves any liability upon the part of the association to the defendant in error different from its obligation to all its other members. It is a manifest absurdity to say that a purely mutual corporation can make an agreement that it will pay all its stockholders who contribute in seventy-eight months, $58.50 per share, each $100 upon each share at the expiration of the seventy-eight months period. It takes profits to pay dividends to stockholders; if there are no profits, there can be no dividends, and any attempt to guarantee dividends to stockholders in a purely mutual

corporation is an absurdity in fact and null and void in law.

The Supreme Court of South Carolina by its decision and this Court by the affirmance thereof in effect hold that the members of a corporate partnership, all of whom enter into a corporation upon the same terms can each draw out of the corporate funds nearly twice as much as they have contributed or as those funds in the aggregate amount to. This Court seeks to rest this extraordinary conclusion upon a finding of fact by a referee that the contract with the corporate members to so pay them for their stock, even if *ultra vires*, is not unenforcible under the law of New York. This finding, as we have shown, is a mere conclusion of law and an erroneous application of certain New York cases which have no possible bearing upon the present controversy.

Against this finding are repeated decisions of the courts of New York directly applicable to the status of the Eastern Building and Loan Association and its members, and the relevant statutes of New York proven as fact and as such undisputed upon the face of the record in this case. Therefore, we think that this case should be decided upon its merits, and that Article IV., Section 1, of the Constitution of the United States, is directly applicable upon the facts to the case at bar.

So far as the *Wiggins Ferry Co.* case (119 U. S., 615), is concerned, we submit, with all due deference, that it is not an authority in support of the opinion of the Court in the case at bar. In the *Wiggins Ferry Co.* case, it is expressly held, that "the constitutional requirement that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State,' implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home." It is also held in that case that "whenever it becomes necessary, under Article IV., Section 1, of the

Constitution for a court of one State, in order to give faith and effect to a public act of another State, to ascertain what effect it has in that State, the law of the other State must be proved as a fact." The undoubted meaning of this doctrine is, that as the State courts do not take judicial notice of the statutes and judicial decisions of other States, such statutes and judicial decisions, when relied upon under the full faith and credit clause of the Federal Constitution, must be given in evidence, and that when so given in evidence they have and must have the same effect given to them by the courts of the State in which they are given in evidence that they have by law and usage at home.

Elmendorf *v.* Taylor, 10 Wh., 152, 159.
Hilton *v.* Guyot, 159 U. S., 113, 194.

This Court, in its opinion in this case, cites the *Wiggins Ferry Co.* case to the proposition that it is a matter of fact for the Referee to determine what the law of New York is. This would be true only in the event that the statutes of New York, admittedly valid as such, had not been given in evidence; that the written decisions construing these statutes had not been given in evidence, and that the only testimony as to the laws of New York was oral. Surely it cannot be claimed that when the statutes of a State are given in evidence in exact accord with the requirements of the *Wiggins Ferry Co.* case, and the decisions construing those statutes are also given in evidence, being thus absolutely proven as facts, undisputed, unquestioned and unqualified, that a referee, by misstating either the language of those statutes or the effect of the decisions construing them, can deprive a party litigant of the protection of Article IV., Section 1 of the Constitution of the United States.

Lloyd *v.* Matthews, 155 U. S., 222, 227.

Stated in the form of a logical syllogism the fallacy of such reasoning seems to us apparent at a

glance. It will not do to say, *first*, that the Constitution of the United States requires that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; *second*, that this means "that the public acts of every State shall be given the same effect by the Courts of another State that they have by law and usage at home"; and, *third*, that after such acts and all decisions construing them have been given in evidence as undisputed facts in a case, a Referee can, by finding as a fact that the law of the given State is other than that contained in the statutes and decisions, deprive this Court of the right to review the question upon its merits and to enforce the full faith and credit clause of the Constitution of the United States in accordance with the plain meaning of its terms.

This is the exact logical result of the opinion in the case at bar, and we submit that it cannot be sustained either upon legal or logical principles.

II.—In support of the arguments just set forth, we submit the following points of law and authorities sustaining the same:

A finding of fact "that there was no such cotenancy between the plaintiff and defendants in the mine in controversy as entitled the plaintiff to an account" is a mere legal inference, not a finding of fact.

Kahn *v.* Smelting Co., 102 U. S., 641, 646.

The finding to be conclusive must be on the point in controversy.

Craig *v.* Missouri, 4 Pet., 428, 429.

A statement in a finding by the Court that "no set-off or recoupment * * * against this claim exists" following an explicit finding of facts which establish a set-off, is merely a conclusion and does not control or affect the facts so found.

United States *v.* Harris (C. C. A.), 77 Fed., 821.

So in the case at bar, the finding of the facts as to the contract of membership, the corporate charter and by-laws, the stock certificates, etc., establishes the proposition that defendant in error is not entitled to recover, and a mere legal conclusion embodied in the findings of the trial Court is without weight or authority here. Surely the rule is well settled that the construction of written instruments as to their legal effect is one of law for the Court, not of fact for a jury or referee, and hence the Referee's construction of the New York statutes and decisions is not a finding of fact binding as such in the Appellate Courts.

In short, when a foreign law is proved as a fact, such proof is not made to the jury but to the Court. The law being proven as a fact, its construction and effect are matters of law for the Court, not of fact for a jury or referee. Consequently, any findings purporting to be findings of fact as to such law are wholly without binding effect upon an Appellate Court:

"In regard to foreign laws, the established doctrine now is, that no court takes judicial notice of the laws of a foreign country, but they must be proved as facts. And the better opinion seems to be that this proof must be made to the Court, rather than to the jury. 'For,' observes Mr. Justice Story, 'all matters of law are properly referable to the Court, and the object of the proof of foreign laws is to enable the Court to instruct the jury what, in point of law, is the result of the foreign law to be applied to the matters in controversy before them. The Court are, therefore, to decide what is the proper evidence of the laws of a foreign country; and when evidence is given of those laws, the Court are to judge of their applicability, when proved, to the case in hand.'"

1 Greenleaf on Evidence (16th Ed.), § 486.

Story on Conflict of Laws, § 638.

Minor on Conflict of Laws, § 213.

The statutes of the United States having provided how the laws of one State shall be authenticated when offered in evidence in another State, the proof of such laws is made by giving them in evidence so authenticated. When so proven their effect as laws of a sister State becomes a question of law for the Court, not of fact for a referee, and the Federal Constitution requires that they be given the same effect that they have in the State of their enactment, when, as in the case at bar, they form an integral part of a contract of corporate membership made and performable in the State of the corporate *situs*.

1 Greenleaf on Evidence (16th Ed.), § 6 *b*.

1 Greenleaf on Evidence (16th Ed.), §§ 486, 489.

While the law of one State must be proved in another as a fact (*Lloyd* v. *Matthews*, 155 U. S., 227), yet it is also true that when a statute is given in evidence and decisions construing it are also given in evidence, the fact is proven and the legal effect of the fact is then a question of law for the tribunal. It is not for a jury or a referee to change the law of New York by finding as a fact that such law is not the law. The Court in such a case could not take judicial notice of the law until proven, but once proven as a fact the meaning and effect of the law and its construction by the courts of the State of its enactment becomes a question of law, not of fact.

Elmendorf *v.* Taylor, 10 Wh., 152, 159.

"Whether a seeming act of the Legislature is or is not a law, is a judicial question to be determined by the Court, not a question of fact to be tried by a jury."

Post *v.* Supervisors, 105 U. S., 667.

Town of South Ottowa *v.* Perkins, 94 U. S., 260, 267.

"The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; on the same principle the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws and treaties of the United States."

Marshall, C. J., in Elmendorf *v.* Taylor, 10 Wh., 152, 159.
Hilton *v.* Guyot, 159 U. S., 113, 194.

And in the case of *Elmendorf* v. *Taylor*, the great Chief Justice, having laid down the law as above quoted, proceeded to review the Kentucky decisions and determine, as matter of law, what the Kentucky law was. This was all the Referee and State Court could do in the case at bar. If they erred in determining and applying the law of New York, if they did not give to the New York statutes the same meaning, construction and effect given to them by the courts of New York, then this Court has full power to review the decision.

The error into which this Honorable Court in its opinion seems to have fallen is, that it has accepted the *ipse dixit* of the Supreme Court of South Carolina that the Referee's finding was a finding of fact,

when in truth it was a mere legal inference; and this being so, it seems to us that a rehearing should be granted in this case in order that the case may be heard and determined upon its merits. The rule in both the Federal and State Courts is, that when a State statute, or a corporate charter dependent upon a State statute, is in question as to its construction or effect, the statute and the corporate charter must first be proven in the manner required by the Act of Congress, or in some other manner satisfactory to the State Court in which the trial is had. Thereupon, when the Court comes, as a matter of law, to construe such State statute and corporate charter, it will look to the decisions of the State Court, which may be given in evidence for this purpose to determine as matter of law the construction, meaning and effect of the State statute or of the corporate charter granted under it.

Bucher *v.* Cheshire Railroad Co., 125 U. S., 555, 582, 583.

Bailey *v.* Magwire, 22 Wall., 215, 230.

Renaud *v.* Abbott, 116 U. S., 277, 285, 286, 287.

Liverpool Steam Co. *v.* Phœnix Ins. Co., 129 U. S., 397, 445, 446, 447, 448, 449, 453 *et seq.*

Minor on Conflict of Laws, § 213.

We are impressed with the belief that the Court in its opinion and decision herein has overlooked the fact that this contract of corporate membership is a contract made and performable in New York; that it is a contract of corporate membership under the coporation laws of New York relating to corporations of this particular class; that these laws have been given in evidence in connection with the corporate charter and by-laws; that the construction of these laws by the Courts of New York has been shown by the decisions of those courts given in evidence; that this constitutes the proof of the laws of New York required by the Federal Statutes and

the Constitution of the United States, and such proof having been made in conformity with the Constitutional requirements it necessarily follows that in order to give full faith and credit to such laws they must be given the same meaning and effect that they have in the State of New York. This, the decision of the Referee and of the Court below denied to the plaintiff in error. Wherefore, we submit that the decision in this case should be for the plaintiff in error and not for the defendant, and this we think the following authorities will conclusively establish:

O'Malley *v.* People's Assn., 92 Hun (N. Y.), 572.
House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.
Heslin *v.* Eastern B. & L. Assn., 61 App. Div. (N. Y.), 458.
Englehardt *v.* Fifth Ward Assn., 148 N. Y., 281.
People *v.* Lowe, 117 N. Y., 175.
Tilley *v.* American B. & L. Assn., 52 Fed., 618, 622.
Campbell *v.* Eastern B. & L. Assn., 98 Va., 729.
Eastern B. & L. Assn. *v.* Snyder, 98 Va., 710.
Bennett *v.* Eastern B. & L. Assn., 177 Pa. St., 233.
Miller *v.* Eastern B. & L. Assn. (Tenn.), 53 N. W. Rep., 231.

For these reasons, and upon the authorities cited, we most respectfully submit that a rehearing should be granted in this case.

WM. HEPBURN RUSSELL,
WM. BEVERLY WINSLOW,
Counsel for Petitioner.

Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 453.

EASTERN BUILDING AND LOAN ASSOCIATION, OF SYRACUSE, NEW YORK, PLAINTIFF IN ERROR,

AGAINST

DAVID W. EBAUGH, DEFENDANT IN ERROR.

Now comes the defendant in error, by its counsel appearing in that behalf and moves the Court to dismiss the Writ of Error in the above entitled cause for want of jurisdiction, because the Judgment brought up on said Writ of Error is the judgment of the Supreme Court of the State of South Carolina, sitting at Columbia, S. C., and it appears that no Federal question was involved in said judgment and the decision of said cause.

And the said defendant in error, by Counsel as aforesaid, also moves the Court to affirm the judgment brought up by the said Writ of Error, because, although the record of said cause may show that this court has jurisdiction in the premises, it is manifest that said question involved was frivolous, and that said Writ of Error was sued out for delay only.

W. H. LYLES,
H. J. HAYNSWORTH AND
L. O. PATTERSON,
Counsel for the Defendant in Error for the purposes of these motions only.

SUPREME COURT OF THE UNITED STATES,
October Term, 1900.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y.
Plaintiff in Error,
AGAINST
DAVID W. EBAUGH, Defendant in Error.

To Wm. Hepbern Russell and Wm. Beverly Winslow, attorneys for the Plaintiff in Error:

Please take notice that on Monday the 21st day of January, 1901, at the opening of Court, or as soon thereafter as Counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of said Court thereon. Annexed hereto is a copy of the brief of Argument to be submitted with said motions in support thereof.

W. H. LYLES,
H. J. HAYNSWORTH AND
L. O. PATTERSON,
Counsel for Defendant in Error for the purposes of these motions only.

ABSTRACT OF CASE.

This case was brought up, by Writ of Error, to the Supreme Court of South Carolina. The Writ is based on the ground that full faith and credit was not given to the laws of New York.

The history of the case briefly stated is as follows:

The plaintiff in error was chartered in 1890; in 1892 one of its agents approached Ebaugh and exhibited to him circulars issued by plaintiff in error, which stated that persons subscribing to the stock of said company would, after 78 payments of 75 cents each, receive par ($100) from the Company for each share of their stock. He also exhibited a certificate of stock containing this provision among others:—"The said Eastern Building & Loan Association of Syracuse, N. Y., agrees to pay said share-holder, or his heirs, executors, administrators or assigns the sum of $100 for each of said shares at the end of 78 months from the date hereof." Ebaugh relied upon this rep-

resentation and took 10 shares of stock of the par value of $100 each. The certificate of stock issued to him contained the promise as quoted above. (Pages 10-11.) In pursuance of the contract contained in this certificate Ebaugh made 78 monthly payments upon said stock, and then surrendered the stock and demanded payment in full in pursuance of said promise. The Association declined to pay the claim, alleging that it was not bound by the promise. Ebaugh then brought his action on this promise in the Court of Common Pleas for Greenville County, S. C. (Pages 1–2.) The Association answered alleging among other things that the contract was ULTRA VIRES under the laws of New York. (Pages 4–9.) By consent, all issues of law and fact were referred to Oscar Hodges, a member of the Greenville bar. At the reference before him Ebaugh proved the facts alleged in the complaint. (Pages 13–14.) The plaintiff in error then undertook to prove that this contract was void under the laws of New York. In order to do this (page 15) he introduced the following evidence:

"An Act known as Chap. 122, passed April 10, 1851, (page 31); an Act amendatory thereof, passed June 9, 1875, (page 35.) Neither contains any terms forbidding such contracts as the one in controversy.

(2) The decision in O'Malley vs. People's Building, Loan & Savings Association, rendered in 1895 by the Supreme Court of New York, was likewise introduced in evidence, (pages 15 and 38.)

(3) Also certain decisions in the Court of Appeals of New York; these, however, bear only remotely upon the question at issue and are far from being conclusive upon the point, (page 15.)

(4) Also deposition of D. A. Pierce, which stated that the Association was not bound by this promise. He based his opinion upon the statutes referred to above, and the decision in O'Malley's case, and decisions from other States, (page 41.)

In reply to this evidence Ebaugh introduced certain decisions of the Court of Appeals of New York, (page 16,) to-wit:

Whitney Company vs. Barlow 63, N. Y., 63.
DeGrabb vs. American Linen Thread Company, 21 N. Y., 124.
Diamond Match Company vs. Pooler, 106 N. Y., 473.

These cases decide that where a corporation made a contract in excess of its corporate powers, but received and retained the benefit therefrom, it would be estopped to deny its liability. There was no evidence to disprove this doctrine. (Referee's Report, page 25.)

On this testimony the Referee held that the contract in question was not forbidden by the statutes of New York, and that it was not immoral, (pages 25-26) and announced that he saw no reason why under the statutes of New York a corporation of this class could not issue stock to be fully paid up after 78 months and redeemable at par at the end of that time. He held that even, if the contract were in excess of the powers of the corporation, it was estopped under the laws of New York, by reason of the fact that it had induced Ebaugh to enter into the contract by its representations that the contract was valid, and it had recived and retained the benefit of the transaction. He held further that O'Malley's case was not controlling, being influenced by two reasons:—

(1) The decision was rendered in 1895, whereas the contract sued on was made in 1892.

(2) The decision was made by the Supreme Court of the State of New York, which is not a court of last resort.

To this report the Association excepted on certain grounds which are set forth in the record.

The matter was then heard by the Circuit Judge, who affirmed the Referee's report, and gave judgment for the full amount of the claim, stating that he was satisfied that the report of the referee was correct in every particular, (page 64.)

The case then went to the Supreme Court of the State, and that Court, after full hearing, affirmed the judgment below, holding that the laws of New York were not in conflict with the construction placed upon the contract by the Courts of South Carolina.

GROUNDS OF MOTION.

(1) The Courts of South Carolina did not deny validity to the statutes of New York.

(2) These Courts did not refuse to be governed by the de-

cisions of the Court of Appeals of New York, construing the statutes of that State, rendered prior to the contract.

(3) These Courts did not decline to be governed by the common law of New York.

These grounds will be developed in the argument which follows.

ARGUMENT AND AUTHORITIES.

(1) Is the Judgment in this Case a Denial of the Validity of the Statutes of New York?

The statutes introduced in evidence by the defendant do not, in express terms, forbid building and loan associations from making such contracts as that made with Ebaugh. The conclusion that such contracts are forbidden by these statutes can be reached only by construction. Mere error in the construction of a statute of another state furnishes no basis for a federal question.

In Glenn vs. Garth, 147 U. S., 360, the chief justice employed the following language:

"If every time the courts of a state put a construction upon the statues of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, in would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated. The distinction between the construction of a statute and the validity of a statute has frequently been adverted to by this court."

Accordingly the writ of error was dismissed, the court declining to consider whether there was error in the construction given the statute by the state courts.

The foregoing doctrine was reaffirmed in Lloyd vs. Matthews, 155 U. S., 222.

In Bonholzer vs. New York Life Insurance Company 178, U. S., 402, a similar question arose; the defendant in error moved to dismiss because the Supreme Court of Minnesota did not deny the validity of the New York statute, but only con-

strued it, and even granting the construction was erroneous, faith and credit were not denied to the statute. The Supreme Court referring to Glenn vs. Garth, 147 U. S., 360, and Lloyd vs. Matthews 155, U. S., 222, employed the following language:

"The question now before this court is, did the court below, in the case at bar, give to the statute such full faith and credit as is secured to it by the Constitution of the United States?

"That question, therefore, is made the ground of our jurisdiction. The defendant in error challenges its sufficiency, and moves to dismiss because the Supreme Court of Minnesota did not deny the validity of the New York statute, but only construed it, and even granting the construction was erroneous, faith and credit was not denied to the statute.

Glenn vs. Garth, 147, U. S., 360.
Lloyd vs. Matthews, 155 U. S., 222.

"Those cases sustain the distinction, which defendant in error makes, and the deduction from it, and our inquiry will therefore be: Did the Supreme Court of the State of Minnesota deny the validity of the New York statute, or only consider its operation and effect? The claim of the defendant in error is that each of the notes was an "installment or portion of the premium," and that therefore the Supreme Court of Minnesota, in holding that the notice prescribed by section 92, was not necessary to be given prior to the maturity of the notes, denied full faith and credit to the statute.

"We dispute the conclusion without passing on the premises. The ruling was a construction of the statute, not a denial of its validity, and that the Court meant no more, and meant to follow, not oppose, the decisions of the State, is evident from its opinion."

Reference to the proceedings in the State Courts in the case at bar will conclusively show that the validity of the New York statutes was not denied, and that the error, if any, was in the construction.

The Referee said: "The defendant introduced in evidence chapters 122 and 564 of the Statutes of New York, under which defendant's charter was issued. And he urges upon me to hold that these Acts forbid the defendant to make a contract

such as that contained in the certificate. There is no provision in these statutes which forbids such a contract; the most that can be said is that the statutes do not confer the powers or authorize a corporation chartered under them to make such an agreement; in other words, that such an agreement is in excess of its charter powers. But I am by no means convinced that these Acts do not confer upon building and loan associations the power to make an agreement of the kind set forth in the certificate of stock. The objection urged against this agreement is that it provides for the maturity of the stock at a definite time. Chapter 122, par. 2, authorizes building and loan associations to provide "the manner of redemption of shares by advances made thereon," "and the ultimate amount to be paid to the owners of unredeemed shares." This chapter as well as chapter 564 evidently contemplates that a building and loan association may issue paid up stock, and they do not impose any limitation upon the price at which such stock is to be issued, or as to terms of its redemption. It is clear that under these statutes the Association could issue ten shares of paid up stock for five hundred and eighty-five dollars in cash, to be redeemed at the end of seventy-eight months. For the same reason I do not see why such an Association may not issue stock to be fully paid up by seventy-eight monthly payments and to be redeemed at par at the end of that time. The latter promise may be unwise, but this is not the question at issue. It is whether such a contract is forbidden by the Statutes. I am clearly of the opinion that it is not forbidden by the statutes, and I so hold. The most that can be said is that such a promise is not authorized by the statute.

"I, therefore, conclude that the promise made by the defendant to pay the plaintiff one hundred dollars for each share of stock at the end of seventy-eight months, is not immoral in itself, and is not forbidden by statute either in New York or in this State."

These holdings of the Referee were confirmed first by the Circuit Judge and then by the Supreme Court.

(2) DID THE COURT IN REACHING THIS CONCLUSION REFUSE TO BE BOUND BY THE DECISION OF THE COURT OF LAST RESORT OF NEW YORK?

The only decisions introduced by the defendant were, (1) O'Malley vs. People's Building, Loan & Savings Association, 92 Hun., 572; (2) Englehart vs. Fifth Ward Dime & Savings Association, 148 N. Y.; (3) People vs. Lowe 117 N. Y., 175, and (4) Concordia Savings & Aid Association vs. Reed, 93 N. Y., 474.

The last three cases did not touch the question whether a corporation formed under chapters 122 and 564 possessed power to make a contract like the one in question. Their influence in the case at bar was persuasive only: their application solely as an argument (rather remote) touching the proper construction.

O'Malley's case was in point, but was not controlling, for two reasons, as follows:

(1) It was a decision of the Supreme Court of New York, which is not a Court of Last Resort.

On this point the Referee said, (p. 27) "The decisions of the Supreme Court of New York, do not settle the law of that State. They tend to this result no more than do Circuit decisions in South Carolina."

The decisions of inferior courts do not constitute controlling precedents or rules to be followed in other cases. STARE DECISIS applies only to decisions rendered by courts of last resort.

In order to show a controlling rule of construction, it was necessary for the plaintiff in error to prove a decision of a court of last resort sustaining the construction for which it contended. But it failed to do this.

The suggestion, that Ebaugh did not prove that the Supreme Court of New York is not a court of last resort, loses sight of the fact that the BURDEN OF PROOF WAS UPON THE PLAINTIFF IN ERROR.

(2) The decision in O'Malley's case was rendered in 1895 (p. 15), whereas the contract with Ebaugh was made in 1892.

In Burgiss vs. Seligman, 107 U. S., 20, it is said, "So where contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own inter-

pretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have occurred."

This doctrine has been re-affirmed by numerous cases including Folsom vs. Ninety-six, 159 U. S., 611.

At the time when the contract with Ebaugh was made, there was no decision of the New York courts maintaining the construction for which the association contends. Had the question involved here arisen at that time, there was nothing to prevent the South Carolina Courts from exercising their independent judgment as to the proper construction of the acts of incorporation. The courts of that State in judging between the plaintiff and defendant in error, were governed by their view as to the proper interpretation of these statutes. In refusing to be controlled by a decision of an inferior court rendered subsequent to the contract, they have not violated the constitutional provision as to full faith and credit.

But, say our friends on the other side, the testimony of Mr. D. A. Pierce is ignored.

Mr. Pierce was the general attorney for the plaintiff in error from the time of its organization (p. 4), and, as it is natural to presume, approved the form of the contract made in the present case.

He states that under the statutes, articles of incorporation, by-laws and decisions, the association was not bound by the promise to pay par for the stock after 78 monthly payments. (Why he permitted the Association to issue these contracts, knowing their invalidity and that the unwary and unsuspicious would be misled to their undoing, he does not explain.) He stated further, "I base my opinion on the statute under which the defendant is incorporated, its articles of incorporation and by-laws, and the decision of the Supreme Court of the State of New York in the case of O'Malley vs. People's Building & Loan Association, 92 Hun., 572, and similar decisions of other States on like statutes."

This testimony discloses absolutely no new light. The opinion of Mr. Pierce as to the proper deduction to be drawn from the statutes and decisions may or may not be instructive. It is hardly controlling upon the South Carolina Courts.

(3) DID THE SOUTH CAROLINA COURTS REFUSE TO RECOGNIZE THE COMMON LAW OF NEW YORK?

We have already adverted to the evidence as to the laws of New York introduced by the plaintiff in error, and to the principles sought to be deduced.

On the other hand the defendant in error introduced in evidence certain decisions of the Court of Appeals of that State for the purpose of showing that, even assuming the contract with Ebaugh to be in excess of its charter powers, the association would nevertheless be bound to the performance of this contract, if it received and retained the benefits thereof. These decisions are as follows:

DeGrab vs. American Linen Thread Co., 21 N. Y., 124.
Whitney Co., vs. Barlow, 63 N. Y., 63.
Diamond Match Co. vs. Pooler, 106 N. Y., 473.

The referee, stating that the above cases were the only evidence before him as to the New York law on this point, continued:

"I find as a matter of fact, that the law of New York is that where a corporation enters into a contract that is in excess of its charter powers or is unauthorized by law, it will nevertheless be bound to perform its agreement as contained in the contract, if it suffers the other party to perform his agreement, and receives the benefits and retains them.

"This being the law of New York, it isconclusive of the case at issue.

"I find as a matter of fact that the defendant promised to pay to the plaintiff one hundred dollars for each share of the stock taken by him, at the end of seventy-eight months; and that it represented to him that in issuing this stock it would be bound to perform this agreement according to its terms.

"I further find that the plaintiff was induced by this promise and this representation to take the stock; and that believing the promise to be valid and that the defendant intended to perform it, he paid the entrance fee and the monthly dues.

"I further find that the defendant, knowing that the plaintiff relied upon the validity of this promise, allowed him to pay his money; and that defendant has continued to hold on to this money and has never offered to return it.

"I, therefore, hold that, even if the contract made by the defendant was in excess of its charter powers, it would not be heard to plead ULTRA VIRES, but would be bound under the law of New York to perform its promise as expressed in the certificate." (Brief, p. 26.)

These holdings were approved by the Circuit and Supreme Courts.

This doctrine accords with the common law of South Carolina. See Williamson vs. Eastern B. & L. Association, 54 S. C., 382, where it is said: "The general rule is that where a private corporation has entered into a contract not immoral in itself, and not forbidden by any statute and it has been in good faith performed by the other party, the corporation will not be heard on a plea of ULTRA VIRES."

Many States besides New York and South Carolina uphold this doctrine.

Rd. Co. vs. McDonald, 60 Am. St. R. 172.

The extracts from the Referee's report serve to show that it, was the intention of the South Carolina Courts to decide this case according to the laws of New York. If there was any error in the decision, it was in the apprehension of that law. Error in the construction to be placed upon statutes and decisions of another State do not amount to a refusal of full faith and credit.

Barholzer vs. N. Y. Life Ins. Co., SUPRA.

We submit, further, that where a contract, whose force and construction are referable to the laws of one State, comes in question in the Courts of another State, these Courts are not bound to give ear to any defence regarded by them as wrong or immoral, merely because such defence would have availed the defendant under the laws of the place of contract. To overrule such defence would not amount to a denial of faith

and credit of the laws of another State, but would merely enforce estoppel arising under general principles of law. Hence no federal question would be raised.

Gilles vs. Stinchfield, 159 U. S., 653.

We, therefore, submit that the motion should be granted.

W. H. LYLES,
H. J. HAYNSWORTH &
L. O. PATTERSON,
Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1903.

Term No. 462.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y.,

Plaintiff in Error,

vs.

DAVID W. EBAUGH,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

ARGUMENT IN OPPOSITION TO MOTION TO BE HEARD AT THE SAME TIME AND TOGETHER WITH CASE No. 190.

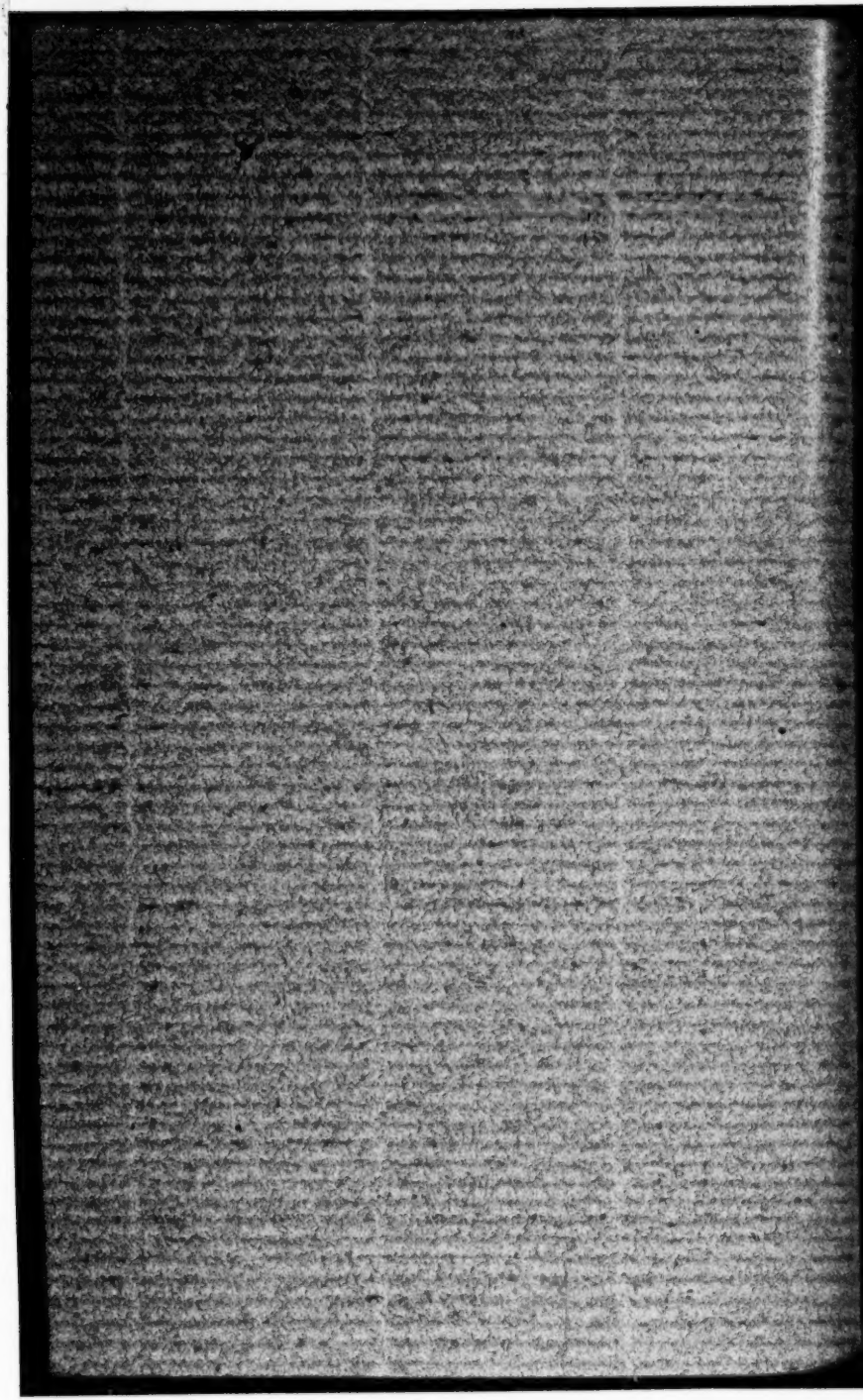
HENRY A. M. SMITH,

Counsel for Walling & Kennedy,

Defendants in Error in Case No. 190.

WALKER, EVANS & COGSWELL CO., PRINT.

(17,938.)



Supreme Court of the United States.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, NEW YORK, Plaintiff in Error, vs. DAVID W. EBAUGH, Defendant in Error.	October Term, 1900. No. 453. Motion to Advance and Hear Together.

BRIEF OF ARGUMENT OF HENRY A. M. SMITH ON BEHALF OF LAWRENCE S. WELLING AND MARION BONNOITT IN OPPOSITION TO MOTION.

This is a motion to advance the Case, No. 453, of "The Eastern Building and Loan Association of Syracuse, N. Y., Plaintiff in Error, vs. David W. Ebaugh, Defendant in Error," so as to be heard at the same time and together with the Case No. 190, of "The Eastern Building and Loan Association of Syracuse, N. Y., Plaintiff in Error, vs. Lawrence S. Welling and Marion Bonnoitt, Defendants in Error," who now file this brief of argument in opposition to the said motion, which they decline to assent to and oppose.

Under the provisions of the 8th subdivision of Rule 26, of this Court, it is provided that two or more cases involving the same question, may, by the leave of the Court, be heard together, but they must be argued as one case. The effect of the motion now before the

Court, therefore, will be that these two cases will be consolidated, and heard together as a single case, if the motion is granted. This Court, however, has decided under the terms of the rule, that one case will not be advanced and heard with another, without the consent of the counsel in both cases.

See *Louisiana v. New Orleans*, 103 U. S., p. 521.
Mays' U. S. Supreme Court Practice, 388.

In addition thereto, we oppose on the ground that the cases are in many material respects wholly dissimilar, and that it would be prejudicial to the separate interests involved in either, that they be heard together.

First. The defendants in error in each case are represented by separate and wholly independent counsel. Although both were cases brought from the Supreme Court of the State of South Carolina, by writ of error, they were cases heard by that Court at different times, upon different issues, and different decisions were filed therein. (Ebaugh Transcript, p. 67, fols. 100-101; Welling & Bonnoitt Transcript, pp. 97-101, fols. 183-188.)

Second. The cases are furthermore wholly dissimilar in the following respects :

It is incorrect, as stated by the counsel on behalf of the motion, that the defendants in error in each case are members of and stockholders in said plaintiff in error. On the contrary, in the case against Welling and Bonnoitt, the question is one entirely of a debtor and creditor relation between the plaintiff in error and the defendants in error (Welling & Bonnoitt Transcript, p. 49, fol. 90.)

It is true, the plaintiff in error *claims* that Welling and Bonnoitt were members of and stockholders in the plaintiff in error, but this claim is strenuously *denied* by Welling and Bonnoitt, who claim themselves to be

wholly independent debtors of the plaintiff in error, and not members in or stockholders thereof. (Ibid.)

Second, although the questions involved in each case are in some respects similar, in others they are most materially different and dissimilar. In the Ebaugh case, it is admitted that he is a member of and shareholder in the Eastern Building and Loan Association. As such member, he is suing the Association of which he is a member, to recover from that Association what he claims to be the maturity value of his certificates of membership. (Ebaugh Transcript, pp. 2-3, fols. 2-4.)

On the other hand, Welling and Bonnoitt deny that they are members of that Association. They insist that they were simply debtors of that Association, to which Association they had given a number of notes, secured by a mortgage. All these notes they paid, and they claim that having paid these notes, they had paid out the debt, and the mortgage was satisfied. (Welling & Bonnoitt Transcript, pp. 2-3, fols. 4-6.)

It will be seen, therefore, that at the very inception of the case there is a very fundamental difference between them. In the one, the Ebaugh case, it is a question of the rights of a shareholder against the corporation of which he is a member, and the laws, rules and by-laws of which he may have adopted by such membership. While in the other case it is a question between a foreign corporation carrying on business in the State of South Carolina, and certain citizens in the State of South Carolina, who acquired and for a time occupied the relation of debtors to that corporation.

Counsel for the motion erroneously state that in each case the defendants in error base their right of action upon the proposition that the statement of the time of the maturity of the stock was a valid agreement on the part of the plaintiff in error to pay the maturity value of the stock at the end of eight months thereafter.

This is true as to the Ebaugh case. It is not true as to the Welling and Bonnoitt case. In the Welling and Bonnoitt case, the defendants in error base their right

of action upon the proposition that they had ceased to be members of the plaintiff in error, and the entire relationship existing between the plaintiff in error and themselves had by agreement been converted into negotiable notes, representing that relation, and having paid those notes, they had fully terminated all relation between themselves and the Association. (Welling & Bonnoitt Transcript, pp. 2, 3, 49; fols. 4-6, 190.)

That is the question, and is the question upon which Welling and Bonnoitt base their right of action—whereas it does not appear as a question in anywise in the Ebaugh case. In addition, Welling and Bonnoitt may make the question that even if they were shareholders in this agreement to mature in seven or eight months would operate as an additional ground for justifying their action against the plaintiff in error; but this proposition on their part is simply an incidental and subsidiary one to the main question, which is that they were not shareholders in that Association, but were only debtors thereto, and had discharged their debt.

Third. The counsel for the motion, in parallel columns, places the assignments of error which have been made by such counsel for the purpose of the writ of error in each case to this Court. It is not, however, the assignments of error which determine the issues before this Court. Counsel may have assigned as error, errors in one case which do not appear as error in the other case. Although the assignments in each appear the same, an examination of the record in each case shows that the questions before the State Courts were wholly dissimilar. The issues as they appear before the State Courts must be deduced from :

1st. The pleadings in the case.

2nd. Exceptions to the rulings of the lower Court for the purpose of the appeal to the Supreme Court.

By reference to the pleadings in the Welling and Bonnoitt case, it will be seen that none of the questions raised by the assignments of error are therein contained.

(Welling & Bonnoitt Transcript, pp. 2-6, pp. 93-94; fols. 174-178.)

The complaint alleges only that Welling and Bonnoitt, who had been mortgage debtors, by the terms of certain specific promissory notes secured by a mortgage to the Eastern Building and Loan Association, had fully paid that mortgage, and then had required satisfaction thereof, which the Building and Loan Association had refused to enter, and therefore they sued for damages. (Ibid.)

The Eastern Building and Loan Association in their answer set up that Welling and Bonnoitt were not simply creditors, but were also stockholders in the Association, and by and under the terms of the charter of the Association they did not, by the terms of the notes, fully pay and discharge the mortgage. (Welling & Bonnoitt Transcrip, pp. 4-6, fols. 7-11.)

In the exceptions to the rulings of the Court below, and which exceptions constitute the statement of all questions upon which the case is heard in the State Supreme Court, certain questions are raised, but there is not a single reference to or statement of any such Federal questions as are stated in the assignments of error, and it is therefore manifest that none of the questions interjected in the assignments of error were raised or passed upon by the Court below. They were raised or passed upon in the Ebaugh case; but the very fact that they were raised in one case, and not in the other case, ought to show the essential difference between the two cases, and intensify the reasoning why they should not be heard together.

Fourth. The two cases, therefore, being as the defendants in the case of Welling and Bonnoitt strenuously insist, wholly dissimilar, and involving different issues, this Court under its ruling will not, against their protest, order the same heard together as one case, and thus compel counsel for the defendants in error in the

Welling and Bonnoitt case to argue questions in which he is not concerned, and yield up any of his time for the argument of questions he considers essential to his client, to the counsel in the Ebaugh case for the argument of questions peculiar to that case.

Respectfully submitted.

HENRY A. M. SMITH,
Attorney for Welling and Bonnoitt.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 177.

EASTERN BUILDING AND LOAN ASSOCIATION, OF SYRACUSE, NEW YORK, Plaintiff in Error,

vs.

DAVID W. EBAUGH, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The plaintiff in error was chartered under the laws of New York, and had its principal place of business in Syracuse, but was authorized to do business in other States. For the purpose of inducing persons from other States to become members and borrowers in said Association, it sent out agents and issued circulars.

Some time in March, 1892, an agent of the plaintiff in error came to Greenville, S. C., and approached David W. Ebaugh for the purpose of inducing him to take stock in the Association. This agent told Ebaugh that the stock would mature in 78 months, and the Company would pay $100 per share. He also exhibited to Ebaugh certain circulars which were issued by the Company (page 14).

The circulars, after announcing that no building and loan

association had ever failed, and that no investments had proven so satisfactory, contained what is called a short catechism, wherein these questions and answers were given: Q. When will the shares reach their par value? A. Shares mature in exactly 6 1-2 years. Q. How much will a member have to pay in altogether? A. On a basis of ten shares ($1,000 maturity value) he will pay in $595, and receive $1,000." (Page 18.)

Elsewhere in this same circular it is stated "All shares, on which payments are made, are regularly matured at the expiration of 78 months (6 1-2 years from date of certificate)." (Page 19.)

In another part of said circular (page 23) it has given a table, which purports to give the "maturity value of shares at end of 6 1-2 years." This table states such maturity value of 10 shares to be $1,000.

On the cover of this circular is to be found the following statement: "The only association making a contract definite in every particular;" also "Stock matures in 78 months."

Ebaugh believed these representations made by the agent and the circulars, and was thereby induced to apply for 10 shares of stock in the association (page 14.)

Thereupon the association issued Ebaugh a certificate for 10 shares of stock, dated April 1st, 1892. This certificate had at its head the following words: "Maturing October 1st, 1898." It contained the following terms: "The said Eastern Building and Loan Association of Syracuse, N. Y., agree to pay said shareholder, or his heirs, executors, administrators or assigns the sum of $100 [illegible] shares at the end of 78 months from the date hereof."

This promise was prominently set forth in the circular and the certificate of stock. It was plain, unmistakable and emphatic, and unconditionally bound the association to pay par after seventy-eight monthly payments.

The stipulation on the back of the certificate of stock to the effect that the stockholder should pay 75 cents per month until "such share matures or is withdrawn," must be construed in connection with the unconditional promise on the face of the policy fixing the period of maturity after seventy-eight monthly payments of seventy-five cents each. Upon the representations contained in the circulars and on the promise made in the certificate, Ebaugh became a subscriber. He paid the membership fee of ten dollars, and regularly each

month paid his monthly dues. On October 1st, 1898, he made the final payment and surrendered his certificate to the association, and asked for the payment of $1,000. The association retained this certificate, but declined to pay and informed Ebaugh that this promise to pay $1,000 after seventy-eight monthly payments was in excess of its charter powers, and that he would have to take his chances with those members who withdrew their stock before maturity. Some correspondence then followed between Ebaugh and the association, and failing to obtain payment, or any satisfactory adjustment Ebaugh brought this action in the Court of Common Pleas for Greenville County, South Carolina, and attached certain property of the association which was in that State.

By consent all issues of law and fact were referred to Oscar Hodges, Esq., a member of the Bar of South Carolina.

At the hearing Ebaugh introduced proof of the facts contained in the forgoing statement. The plaintiff in error then undertook to prove that the contract was void under the laws of New York, and for this purpose it introduced the following evidence:

(1) An Act known as Chap. 122, passed April 10, 1851, (page 31); An Act amendatory thereof, passed June 9, 1875, (page 75); neither contains any terms forbidding such contracts as the one in controversy.

(2) Articles of Association and By-Laws. These show that it was intended to transact business in other States besides New York, and, hence, that the business of the association should be conducted under other laws besides the laws of that State. They also show that the association was not confined in its business to the limits of a strictly building and loan association, and that the directors had the power to contract as to the maturity of the shares.

(3) The decision in O'Malley vs. People's Building, Loan and Savings Association, rendered in 1895 by the Supreme Court of New York, was likewise introduced in evidence, (pages 15 and 38).

(4) Also certain decisions of the Court of Appeals of New York. These, however, bear only remotely upon the ques-

tion at issue, and are far from being conclusive of the point, (page 15).

(5) Also deposition of D. A. Pierce, which stated that the association was not bound by this promise. He based his opinion upon the statutes referred to above, and the decision in O'Malley's case, and decisions from other States, (page 41).

In reply to this evidence Ebaugh introduced certain decisions of the Court of Appeals of New York, (page 16) to wit:

Whitney Company vs. Barlow, 63 N. Y., 62.

DeGrabb vs. American Linen Thread Company, 21 N. Y., 124.

Diamond Match Company vs. Roeber, 106 N. Y., 473.

These cases decide that where a corporation makes a contract in excess of its corporate powers, but receives and retains the benefit thereof, it is estopped to deny its liability. There was no evidence to disprove this doctrine. (Referee's Report, page 25.)

After full argument the referee filed his written report to be found at pages 25 to 28. He held that the contract in question was not forbidden by the Statutes of New York, that it was not immoral, and announced that he saw no reason why, under the Statutes of New York, a corporation of this class could not issue stock to be fully paid up after 78 months and redeemable at par at the end of that time. He held further that even if the contract were in excess of the charter powers of the corporation, it was estopped under the laws of New York from pleading ultra vires by reason of the fact that it had induced Ebaugh to enter into the contract by its representations and promises, and had received and retained the benefits of the transaction. He held further that O'Malley's case (relied on by the plaintiff in error) was not controlling for two reasons. (1) The decision was rendered in 1895, whereas the contract sued on was made in 1892; (2) the decision was rendered by the Supreme Court of the State of New York, which is not a Court of last resort. The referee, therefore, held that the plaintiff was entitled to recover judgment according to the terms of the contract.

To this report the association excepted on certain grounds

which are set out in the record. The matter was then heard by the Circuit Judge who affirmed the referee's report, stating that he was satisfied that the report of the referee was correct in every particular (page 64).

The case then was taken to the Supreme Court of South Carolina, and that Court, after a full and fair hearing, affirmed the judgment below.

The case now comes to this Court upon certain assignments of error, which make the following points: (1) That the State Court erred "in refusing to give full faith and credit to the public acts, records and judicial decisions of the State of New York." (2) That it erred in its construction of the contract. (3) That it erred in construing the Statutes of New York. (4) That it erred in construing the decisions of New York. (5) That the decision below impaired the obligation of the contract in question.

We shall see in the further discussion that no federal question is involved in the 2nd, 3rd and 4th points.

At the last term of this Court the defendant in error submitted a motion to dismiss on the ground that it appeared on the face of the record that no federal question was involved, in that the State Court (1) neither denied validity to the Statutes of New York, (2) nor refused effect to the decisions of the Court of last resort, (3) nor to the common law of that State.

This motion was, by an order of the Court, continued until the hearing upon the merits.

We now press this motion and ask the attention of the Court to our printed argument heretofore submitted.

The defendant in error claims that the State Court ought to have decided this question according to the laws of New York; that the decision was opposed to those laws; and that thereby at least two clauses of the Federal Constitution were violated. We will discuss these questions in the order stated.

I.

THE SOUTH CAROLINA COURTS WERE NOT BOUND TO DECIDE THIS CASE ACCORDING TO THE LAWS OF NEW YORK.

The sale of shares to Ebaugh was clearly within the corporate powers of the corporation. The only question made

is whether the agreement as to fixed maturity, contained in the certificate, can be enforced.

Counsel insists that under the laws of New York this agreement cannot be enforced because it operates as a discrimination between shareholders, and that such agreements are unauthorized by the laws of that State.

The law of South Carolina, however, is that such agreements can be made; but even where unauthorized, the association will be held to perform its promise after issuing the certificate and receiving the benefits, and that otherwise a fraud would be permitted. The question now is whether the South Carolina Court in a case where it has complete jurisdiction of the subject matter and of the persons, is bound to yield its own judgment to what is alleged to be the law in New York.

We submit that it is not, and for the following reasons:

(A)

The question as to the authority of mutual associations to make contracts of this kind is one of general law. It must be solved by reference to the general relation between the association and its members, and not, as we shall presently show, by any special provision of the New York Statutes. So clearly is the contract of membership a matter of general law, that counsel for plaintiff in error seeks to apply to it the provisions of the Interstate Commerce Act. (Brief, page 59.)

Clearly the Courts of the forum are not bound to follow the decisions of the Courts of the place of contract, touching matters of general law.

(B)

The contract of the defendant in error expressly provided that it could do business in any State (record, p. 48).

When, therefore, persons became members of this association, this provision, being in the charter, became a part of the contract. The contract of membership, then, had reference to the corporation carrying on business in other States, which business must necessarily be conducted under the laws of those States, and which might result in imposing upon them a different liability, and giving to them different rights from those obtaining under the laws of the place of in-

corporation. This doctrine is illustrated by the recent case of Pinney vs. Nelson, decided by this Court on December 2, 1901.

The facts in that case are as follows: The Los Angeles Iron and Steel Company was organized under the laws of Colorado, which provided that stockholders should not be liable for the debts of the corporation, beyond their stock. The articles of association declared that the company could do business in the State of California. The laws of that State provide that stockholders of foreign corporations, doing business in the State, should be subject to the same liability as stockholders in domestic corporations, and that these latter were liable for all debts of the corporation in proportion to their stock. The company failed, and suit was brought against certain stockholders in the Courts of California, which rendered judgment for the liability imposed by the laws of that State.

On writ of error to this Court the judgment of the State Court was affirmed. Mr. Justice Brewer, delivering the opinion of the Court, employed the following language:

"Not content to rely upon the general authority which by the rules of comity the Colorado corporation would have to enter California and transact business therein, they in terms set forth that a part of the purpose of the incorporation was the transaction of business by the corporation in California. Now, when they in terms specified that they were framing a corporation for the purpose of having that corporation do business in California, is it not clear that they were contracting with reference to the laws of that State? Contracting with reference to the laws of that State they must be assumed to know the provisions of those laws; that by them a personal liability was cast upon the stockholders in corporations formed under the laws of the State, and that that same liability was also imposed upon the stockholders of corporations formed under the laws of other States and doing business within California. How can it be said that those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California? Suppose these same stockholders in Colorado had formed a partnership with the expressed intent of carrying on business in California, would not that expressed intent be a clear reference to the laws of California and an incorporation of those laws into the liability created by the partner-

ship business in California? And if this rule obtains as to contract of partners between themselves, why not also as to contracts of stockholders between themselves in forming a corporation?

"In this case it appears that the business transactions out of which these liabilities arose were carried on in California. They resulted from business done in California by virtue of an express contract made by the stockholders with reference to such business. It is unnecessary to express an opinion upon the question whether any personal liability would be assumed by the stockholders in reference to business transacted in Colorado. Parties may contract with special reference to carrying on business in separate States, and when they make an express contract therefor the business transacted in each of the States will be affected by the laws of those States, and may result in a difference of liability. Neither is it necessary to express any opinion upon the question whether the defendants could have been held liable under the California Statutes, independently of the provisions of the Colorado charter. All that we here hold is that when a corporation is formed in one State, and by the express terms of its charter it is created for doing business in another State, and business is done in that State, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business."

When the charter of the plaintiff in error provided for doing business in other States, this involved a charter contract that the business done in these States should be governed by their laws. If then the laws of any State where business was being done imposed a liability different from that under the laws of New York, this difference would be within the provision of the charter, and the non-resident stockholders must be held to have consented thereto.

The contract with Ebaugh having been made in South Carolina, the association and all its membership will be deemed to have consented through the charter, that it should be governed by the laws of that State.

II.

THE DECISION OF THE STATE COURT WAS NOT OPPOSED TO THE LAWS OF NEW YORK.

It was incumbent upon plaintiff in error to prove that the liability of the corporation under the laws of New York was different from that under the laws of South Carolina. The evidence on this point consists of two Statutes and four decisions, to which the discussion will now relate.

(A)

AS TO THE STATUTES.

These were the Acts of April 10, 1851, and an amendatory Act of June 9, 1875 (Record, p. 31-7).

The following points will be developed in this discussion:

The Statutes contain no express provision against the issue of stock guaranteeing a definite period of maturity; nor is such a prohibition to be implied; but if implied it arises from construction and from consideration touching the general nature of such associations, and in neither case is a federal question raised.

The provisions of the Act of 1851, in so far as they affect the question at issue before this Court, are briefly stated below:

Section 1 provides that nine or more persons may form a corporation for the purpose of accumulating a fund to buy real estate, erect buildings and erect improvements, or to aid its members in acquiring real estate, &c. (The business is therefore not limited strictly to the business of a building and loan association, but may have a wider scope.)

Section 2 declares that articles of association shall be signed by such persons, providing among other things "the manner of withdrawal of shares" and the "ultimate amount to be paid to the owners of unredeemed shares." (This section evidently contemplated that the amounts which should ultimately be paid to the owners of shares which had not been redeemed by the association ,was a matter to be determined by the association itself.)

Section 3 provides that a copy of the articles so signed shall be filed by the Clerk of the Court, and that the association may commence business and be vested with the powers conferred by title3, chapter 18 of the first part of the Revised Statutes. (This chapter was not introduced in evidence,

hence so far as the evidence shows, the powers of this association are unlimited. It was incumbent upon the association to show that the contract in question was beyond the scope of the powers as conferred, but it has not done so.)

Section 4 authorizes the trustees to call for all sums of money subscribed, under penalty, etc.

Section 5 gives the power to borrow money for not over two years.

Section 6 does not touch the question at issue.

Section 7 was amended by the Act of 1875 and need not be set forth here.

Sections 8 to 22 do not touch the question at issue.

The Act of 1875 amends section 7 of the Act of 1851 and provides that the trustees may "from time to time declare dividends from the earnings of the association * * * but no dividends shall be declared except from the earnings of the association." It further declares that "no holder of redeemed shares shall claim to be exempt from making the monthly or other stated payments provided in the articles of association, upon the ground that by reason of losses, or otherwise, the association has continued longer than was originally anticipated, whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest." It also provides that the Statute of Usury shall not apply to its loans.

The other sections of the Act of 1875 relate to the reports to be made by the officers and the superintendence to be exercised by the government.

No provision declares that all stockholders shall be bound to pay equal amounts, or upon the same basis. No express provision prevents the issue of stock for cash, or payable in installments and to be deemed paid up at a definite period. The association is to determine for itself "the ultimate amount to be paid to the owners of unredeemed shares."

Act of 1851, sec. 2.

Thus it is left to the association to make its own regulations as to the issue of stock, and its own agreements as to the time and amount of ultimate payment.

The provision that dividends shall be paid only out of the earnings is not conclusive, for: (1) It does not appear that the earnings are sufficient to pay Ebaugh and those occupying the same position. (2) The money payable to Ebaugh is not a dividend, but the ultimate amount agreed to

be paid him as the owner of unredeemed shares. (3) This provision contains no express denial of such power, and the rights of creditors not intervening, there is no reason why it should be implied.

There being no express prohibition against the issue of stock maturing at a definite period, such a prohibition, if it exists at all, is implied, and can only arise from considering the general nature of building and loan associations. But deductions from this source are matters in the realm of general law; and if a State Court reaches incorrect conclusions thereon, no federal question is presented.

O'Malley vs. Association, 92 Hun. 572, on which the attorneys for the other side lay so much stress, does not decide that certificates containing agreements as to definite periods of maturity are expressly forbidden by the Statute; but that "the authority to issue a certificate with a fixed period of maturity is not expressly given." (Record, p. 41.) It is true that the Court did conclude that the association had no authority to issue such certificates; but it based that conclusion upon the mutual character of such associations and on the consideration that a contrary construction might lead to bankruptcy. That case was decided three years after the contract with Ebaugh; and yet the question as to the authority of the association to issue certificates of this character is treated as having been determined by no previous authoritative decision, and hence as being still open in that State. That decision, as we have said, rests almost entirely upon considerations arising from the general nature of such associations.

(B)

AS TO THE DECISIONS INTRODUCED BY PLAINTIFF IN ERROR.

These decisions are as follows:

Association vs. Reed, 93 N. Y., 474.
People vs. Lowe, 117 N. Y., 175.
O'Malley vs. Association, 92 Hun., 572.
Englehart vs. Association, 148 N. Y.

The last two decisions are subsequent to the contract with Ebaugh.

Concordia, etc. vs. Reed, supra, was an action to foreclose

a mortgage given by a member of the association. The mortgage provided [illegible] when the payments upon the shares and fines amount to a sufficient sum to mature the shares. The Court held that the burden of showing sufficient payments from these sources was upon the mortgagor, and further that the premium paid for the loan did not constitute usury. It did not touch the point at issue in the case at bar.

People vs. Lowe, supra, was a contest between the members of an association that had gone into liquidation before the maturity of its shares. The Court held that all members were entitled to share pro rata and equally, and that those who had borowed from the association must pay into the treasury enough to equalize matters, and that the remission of fines was in the discretion of the managers. This case did not touch the point at issue here.

In neither of the foregoing cases was the power to issue certificates with definite maturity provisions in issue, and neither decision contains any announcement bearing on the question. We leave it to the counsel on the other side to get what comfort they can from these two cases.

The other two cases were decided after the contract was made with Ebaugh, and hence they can have only an argumentative effect in determining what was the law of New York at the time of the contract.

The rule is well settled that the Courts of one jurisdiction in construing the Statutes of another jurisdiction must, in the absence of authoritative decisions of the latter jurisdiction fixing the construction, exercise their own independent judgment as to the proper construction; and that they should not be governed by decisions rendered subsequent to the date of the contract.

Pinegrove Township vs. Talcott, 86 U. S., 227.
Burgess vs. Seligman, 107 U. S., 364.
Carroll County vs. Smith, 111 U. S., 556.

The decision in O'Malley's case was not rendered by a Court of last resort; it is not an authoritative decision in New York; and hence the South Carolina Courts should not have regarded it as settling the law. Besides, this decision did not rest upon the express terms of the Statute, but rather upon the general nature of the corporation.

Englehart vs. Association, supra, was a decision of the

Court of Appeals rendered in 1896. There were only two questions considered, viz: (1) whether a withdrawing stockholder could recover judgment for the amount paid in by him without showing necessary funds in the treasury. This claim was made under the provisions of the articles of association to the effect that the dues paid in by withdrawing stockholders "will be refunded to them when the necessary funds are collected." The Court held that the right to recover was qualified by this provision and that it was necessary to show that sufficient funds had been collected. (2) The other question was whether a by-law adopted after a withdrawing stockholder had become a member, prescribing the order of paying withdrawals, was binding. The Court held that the association had the right to make reasonable by-laws and that this one was binding upon all members. These were the only questions considered by the Court, and the discussion fails to dislose any allusion to the question under consideration.

These are the decisions upon which the plaintiff in error relied. Two were prior to the contract, but these did not touch the point in issue here. The other two decisions were subsequent to the contract; one of these, however, did not touch the question in this case, and the other was rendered by an inferior Court.

AS TO THE DECISIONS INTRODUCED BY DEFENDANT IN ERROR.

These are:

Whitney Arms Co. vs. Barlow, 63 N. Y., 62.
DeGrauff vs. Thread Co., 21 N. Y., 124.
Match Co. vs. Roeber, 106 N. Y., 473.

The purpose of these was to show that, even if the stipulation as to a fixed period of maturity were in excess of its corporate authority, the association having led Ebaugh into the contract by its false promises and having received and retained his money, could not refuse to perform its agreement.

In Whitney Arms Co. vs. Barlow, supra, at p. 70, the Court said: "It is now very well settled that a corporation cannot avail itself of the defense of ultra vires, when the contract has been in good faith fully performed by the other

party and the corporation has had the full benefit of the performance of the contract."

In DeGrauff vs. Thread Co., supra, at p. 128, the Court put the case as follows: "To deny relief to a plaintiff thus situated, would substantially secure to the party deliberately violating one of the laws of its existence, and when no guilty complicity can be charged upon the other party, the fruits of an illegal transaction and operate as a premium upon repudiation and fraud."

The State Court held upon this showing that under the laws of New York, the association could not refuse to perform the agreement into which it had enticed Ebaugh (by more than questionable means) and the price of which it had received from him.

Counsel claim that this is not the doctrine of New York, but they introduce no proof to conrovert it.

They claim that the foregoing cases ought not to be applied to mutual associations. But they introduced in evidence no decisions showing that such associations were excepted from the rule; and in the absence of a showing to this effect, the South Carolina Courts were bound to reject the suggestion, for in that State it has been held that mutual companies are bound by their contracts to the same extent as ordinary corporations. McBride vs. Mutual Ins. Co., 55 S. C., 589; Sparkman vs. Supreme Council, 57 S. C., 16.

This doctrine was applied by the Supreme Court of South Carolina to the case of a mutual corporation, in Williamson vs. Association, 54 S. C., 582, where it was said: "when a private corporation has entered into a contract not immoral in itself, and not forbidden by any Statute, and it has been in good faith performed by the other party, the corporation would not be heard on a plea of ultra vires."

Where the doctrine that one should not be allowed to repudiate liability on a contract after he has received the benefits, is applied to corporations at all, it should be applied equally to mutual and ordinary corporations. Both classes are formed for the personal benefit of the stockholders, who are mutually interested in the capital and earnings. Both must act through agents, and should be equally bound by contracts so made.

In National Bank vs. Matthews, 98 U. S., 621, this Court, quoting from Sed. Sts., said: "where it is a simplequestion * * * of power conferred by the charter, a party who has

had the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity."

No federal principle was violated by the holding that the plaintiff in error was estopped to make the plea of ultra vires. Gilles vs. Stinchfield, 159 U. S., 653.

III.

The State decision did not violate Const., art iv, sec. 1.

This clause reads as follows: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws provide the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

As suggested from the bench on the argument of the case of Association vs. Welling, it may well be doubted whether this clause was intended to provide that the public Statutes of the several States should be given effect by the Courts of the other States. If "public acts" means those general rules of law adopted by Statute, the question at once arises why no provision was made for the equally important rules of law recognized as part of the common law of the several States or established by the decisions of their Courts. Did the clause mean that the statutory rules of law applicable to contracts made in a State shall be enforced by the Courts of every other State where the contract might be brought in question, but that those other rules, constituting the great body of the laws of each State, may be ignored with impunity? It is certain that the clause makes no guarantee of "full faith and credit" as to the common law, or as to those principles settled by the decisions of the several States. And this silence is eloquent as to the meaning. If the purpose was to guarantee faith and credit to the public laws of each State, the expression "public acts" would not have been employed. The Convention would hardly have intended to secure faith and credit to what is really a small portion of the public laws, and make no provision for the larger and more important portion of these public laws.

The Articles of Confederation had provided that "full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and

magistrates of every other State." The words "acts,' as used here, was certainly not the equivalent of public Statutes; rather did it refer to these transactions on the part of the State of an administrative character. When this clause, with slight changes in verbiage and in the position of the words, was transferred to the Constitution, there is no reason for supposing that the word "acts" was used in an essentially different sense.

A public Statute will be a "public act" within the meaning of this clause, if it grants a franchise, or creates a contract on the part of the State. Of such character was the Statute under discussion in the Wiggins Ferry Case, 119 U. S., 615.

Anotehr question, which, aswe are informed, was suggested from the bench, is whether the "full faith and credit" which were guaranteed by the Constitution means the "same effect and force" allowed in their own States. To this we think a negative answer must be made.

The Constitution guaranteed "full faith and credit," but committed to Congress the power to prescribe "the effect." The matter guaranteed and the matter referred to Congress can not be one and the same thing. There must be a difference. "Full faith and credit" is denied only when the authority of the State, or the validity of the public act, record or proceeding, is drawn in question.

Rd. vs. Hopkins, 130 U. S., 210.

By guaranteeing "full faith and credit," the Constitution did not mean to declare "the effect"—that much is certain. So that the extra-territorial effect of "public acts" is not settled by the Constitution.

In pursuance of the power conferred upon Congress, that body declared that the acts of the legislatures of any State shall be authenticated under the great seal of the State, and the records and judicial proceedings by the attestation of the Clerk of the Court, &c., "and the said records and judicial proceedings so authenticated shall have such faith and credit in every Court of the United States as they have by law, or usage of the Courts, of the State from which they are taken." Rev. Sts., sec. 905.

Although Congress provided the mode of proving the Acts of the Legislature, it made no provision as to "the effect" of these Acts when proved. The extra-territorial effect of public Statutes not having been prescribed either by the Constitution, or by Act of Congress, the question was

left open for the detremination of the several State Courts. These Courts, although not bound by any federal law, would of course continue to observe the rule of comity. And this brings us to discuss that rule, and to show that a violation thereof raises no federal question.

It is quite true, as stated by counsel for plaintiff in error (p. 20-2), that prior to the Constitution it was a rule of public law that personal contracts should be allowed by the Courts of any country, where they might be called in question, the same effect, which they have in the country where made. This, however, was a rule of comity, to which there was a qualification fatal to its application in the present case, viz: that the contract when so construed should not be against public morals, or opposed to the public policy of the forum.

Counsel argue that Art. IV, sec. 1 was intended to crystalize this rule and enforce its recognition by the States. The rule of comity embraced the entire body of law. A constitutional provision seeking to adopt this rule would hardly limit its operation to these laws which were of statutory origin.

Counsel's position is that wherever a transaction had in one State comes in question before the Courts of another State, the full faith and credit clause guarantees that the laws of the State of the transaction shall be applied by the Courts of the forum; and that no cengressional action is necessary to secure this result.

But if this be so, why was it thought necessary to make special provision by Act of Congress that the Courts of the several States should give to records and judgments of other States the same effect which they have under their own laws? Do domestic laws, under the full faith and credit clause, follow contracts and other private transactions into other States, but stop at the State limits as to records and judgments? And yet records and judicial proceedings are specially named as coming within the full faith and credit clause, while contracts and other private transactions are not named, and were not intended to come within that clause.

This clause of the Constitution was intended to secure inter-State recognition of the validity of the public acts, records and judicial proceedings of the several States; but was not intended to secure their proper construction and

interpretation—certainly there was no purpose to afford a constitutional guaranty for the correct interpretation of private contracts.

The law of the place of contract is said to form a part of the contract, but only because the Courts of other States and countries will ordinarily give to the contract such force as it posses under the laws of the place wehere made. In no other sense is the law of the place of the contract a part of the contract—certainly this is not a result of any constitutional guaranty, because the doctrine existed before the birth of the Constitution. The failure, then to construe a contract according to the laws of the State where made, is in no sense a violation of the constitutional provision. This must be admitted as a general proposition. An exception as to statutory rules would only lead to absurdity. The conclusion is unassailable, that this clause was not intended to secure for contracts the same interpretation, to which they are entitled under the laws of the place where made.

When Courts err in the construction of the Statutes of their own States, there is no denial of faith and credit. And it is certain that the constitutional guarantee of "full faith and credit" was not intended to enforce correct construction of every Statute of another State which might incidently arise in the course of trial.

An interpretation which is radically wrong will not raise a federal question.

Central Land Co. vs. Laidley, 159 U. S., 103.

The point, that erroneous construction of the Statute of another State is not a denial of full faith and credit to that Statute, is clearly developed by the recent decisions of this Court.

In Glenn vs. Garth, 146 U. S., 360, the Chief Justice employed the folowing language:

"If, every time the Courts of a State put a construction upon the Statutes of another State, this Court may be required to determine whether that construction was, or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the State Courts had refused to give full faith and credit to the Statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated. The distinction between the construction of a Statute and

the validity of a Statute has frequently been adverted to by this Court."

This doctrine was reaffirmed in Lloyd vs. Matthews, 155 U. S., 222.

Banholzer vs. Insurance Company, 178 U. S., 402, was another case directly in point. It was held there that even, if the construction placed upon a New York Statute by the Courts of Minnesota was erroneous, faith and credit was not thereby denied to that Statute. Accordingly the Court dismissed the writ.

In Glenn vs. Garth, supra, the Court referred to the case of Baltimore P. R. Company vs. Hopkins, 130 U. S., 210, as drawing the distinction between misconstruction and the denial of the validity of a Statute. On reference to that case we find the following language:

"Whenever the power to enact a Statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise."

The terms of the referee's report, which was made the basis of the Circuit and of the Supreme Court decisions, show conclusively that the validity of the New York Statutes was not denied, but on the contrary, that the terms of those Statutes were carefully considered and a construction placed upon them (deemed by the State Courts correct, but which is disputed by the plaintff in error); it shows also that due consideration was given to the decisions of the Courts of New Yeork rendered at the date of the contract. The conclusion reached was that the contract was not forbidden by the Statutes of New York, and that even if it were in excess of the charter powers (and the Court did not believe this to be the case) yet, "under the principles of law as established in that State, and in this State, the defendant would be bound to perform its promise where it had received, and where it retains, the benefits of the transaction."

IV.

THE DECISION OF THE STATE COURT DID NOT OPERATE TO IMPAIR A CONTRACT, OR TO DEPRIVE PLAINTIFF IN ERROR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

The State decision enforced the contract according to its express terms. It declined to permit a positive promise to be emasculated by a doubtful application of the by-laws. It construed the laws of New York so as not to destroy the binding force of the agreement. How such a decision can be regarded as an impairment of the contract is past comprehension.

The Constitution prohibits the passage by the States of laws impairing the obligation of contracts. The decision of the State Court certainly did not amount to the passage of a law.

The case of Central Land Company vs. Laidley, 159 U. S., 103, is conclusive upon this question. The Court employed the folowing language: "The appellate jurisdiction of this Court, upon writ of error to a State Court, on the ground that the obligation of a contract has been impaired, can be invoked only when an Act of the Legislature alleged to be repugnant to the Constitution of the United States, has been decided by the State Court to be valid, and not construed by the Court * * * * It was said by Mr. Justice Miller, in delivering a later judgment of this Court: "We are not authorized by the Judiciary Act to reveiew the judgments of the State Courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State could be brought here, where the party setting up a contract alleged that the Court had taken a different view of its obligation to that which he held.' Knox vs. Exchange Bank, 79 U. S., 379."

Again in the same case the same doctrine was stated by Mr. Justice Harlan speaking for this Court, as follows: "The State Court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void, which in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may,

in our opinion, be radically wrong; but in neither of such cases, would the judgment be reviewable by this Court under the clause of the Constitution protecting the obligation of contracts against impairment by State legislation."

Again, it is said in the same case: "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State Court does not deprive the unsuccessful party of his property without 'due process of lay,' within the 14th Amendment of the Constitution of the United States."

See also Bower vs. Texas, 163 U. S., 216.

V.

THERE WAS NO VIOLATION OF THE INTERSTATE COMMERCE ACT.

The argument of counsel under this head is ingenious and interesting, but there are two reasons why it has no practical application to the case at bar:

(1) The point is not made by any assignment of error.

(2) In order that a question should arise under this Act, it must appear that some right, conferred or protected by the Act, has been violated, and in this case there is no such showing.

VI.

IN CONCLUSION.

Counsel for plaintiff in error make a fierce attack upon the State dicision, charging that it is "a mere pretext, upon which to deprive plaintiff in error of its property, and to refuse to give full faith and credit to the laws of New York;" (Brief, on motion to dismiss, p. 28) that it "may be due process of law, but, if so, it is neither justice nor honesty" (p.35); that it is "repudiation and confiscation and not construction and interpretation."

This language invites the Court to declare that the South Carolina Court dealt dishonestly with the question at issue, and indeed this is the only ground upon which counsel can hope for a reversal.

It is possible that a State Court, while professing to give full faith and credit to the Statutes of another State, may in

fact repudiate the validity of those Statutes. But that would be an extreme case, and very different from the one at bar. This Court, being familiar with the high character of the South Carolina judiciary, will require of us no answer to such a charge—certainly not when made in behalf of one who, having obtained money under a promise solemnly and deliberately made, now seeks to escape liability by the pitiable plea of ultra vires.

The mental attitude of the association is correctly described in an old couplet:

> "Ne'er thief did feel the halter draw
> With good opinion of the law."

If counsel's language has any real meaning, the purpose was to declare that the doctrine contended for by plaintiff in error is so plain under the laws of New York that there is no room for two honest opinions.

But this statement presents a terrible arraignment against the association, which must be presumed to have known its charter powers and the laws under which it was created. If the promise to mature in 78 months was plainly void and known to be so, then the association was guilty of gross fraud in issuing such a promise and receiving money paid upon the faith of its validity.

Counsel can extricate their client from this unfortunate predicament only by admitting the correctness of our contention, that there was no express prohibition against such contracts, and that his conclusion can be reached only by a (doubtful) construction of the terms of the Statute. And this admission would be fatal to the writ of error.

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ADDENDA TO ARGUMENT FOR DEFENDANT IN ERROR.

Article IV, section 1, of the Constitution provides (1) that full faith and credit should be given to the public acts, records, and judicial proceedings of each State by every other State; (2) and that Congress should have power to prescribe the manner of proof, and the effect when proved.

We have already indicated certain reasons why "public acts," as here employed, is not the equivalent of public statutes, but rather refers to public acts of an executive character.

Brief, p. 15.

No definite meaning has ever been given to the words "full faith and credit." The same expression is found in the Articles of Confederation; and, in the language of Alexander Hamilton, it was thought to be "extremely indeterminate, and (that it) can be of little importance under any interpretation which it will bear."

The Federalist, p. 296.

In Railroad *vs.* Hopkins it was declared that full faith and credit is denied a public act only when the authority of the State or the validity of the act is drawn in question.

130 U. S., 210.

It is certain that the Constitution, by guaranteeing full faith and credit, did not intend to provide for the extra-territorial effect of public acts, for by the same section the latter subject was expressly committed to Congress. The purpose was to confer upon Congress "the power of prescribing by general laws the manner in which the public

acts, etc., shall be proved, and the effect they shall have in other States."

The Federalist, p. 296.

Congress has refrained—and evidently with a purpose—from providing any fixed rule touching the extraterritorial effect to be given State statutes. Had the Constitution or Congress declared that every State must give the same effect to the statutes of each State which they have in the enacting State, the following consequences would have followed:

Vicious legislation adopted by a State would be entitled to full effect in every other State; statutes permitting fraudulent transactions, or polygamous or incestuous marriages, or legitimating lotteries or other forms of gambling, would call for respect and enforcement at the hands of all State courts. The Northern States would have been required to give full effect to the slavery laws of the South and to protect and enforce property rights in slaves—and in this case the clause of section 2, article IV of the Constitution, requiring the surrender by the States of persons held to labor under the laws of any State, would have been entirely useless; but this court, in enforcing slavery rights in the Northern States, always grounded its decision upon section 2 of article IV. If the slavery laws of the South were guaranteed full effect in the States of the North by section 1 of article IV, how did this court happen to overlook the fact?

Judgments of a sister State are held conclusive of all issues because Congress declared that they should have this effect.

"The Constitution contemplated a power in Congress to give a conclusive effect to such judgments."

Miles *vs.* Duryee, 7 Cranch, 481.

The failure of Congress to exercise the power to declare the effect of public acts of other States leaves such acts without a guaranteed extraterritorial effect.

And so it happens that the State courts, in applying the laws of sister States to controversies in hand, have always been governed by the rules of comity as between States, and not by any constitutional requirement.

Chief Justice Taney, in Bank *vs.* Earle, said:

"They are sovereign States; and the history of the past, and the events which are daily occurring furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent" (13 Pet., 590).

Again:

"But we have already said that this comity is presumed from the silent acquiescence of the State. Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made" (13 Pet., 592).

Mr. Webster, in his great argument in that case, admitted that the rule was not established by any supreme authority, but rested solely upon "the common consent and understanding of the States."

If there is the constitutional guarantee contended for by plaintiff in error, counsel and the court were guilty of a strange oversight in Bank *vs.* Earle.

The courts without exception have declared that State statutes creating corporations depend for recognition by other States upon comity alone.

In Paul *vs.* Virginia, Justice Field said:

"The recognition of its (the corporation's) existence even by other States, and the enforcement of its contracts made therein, depends purely upon the comity of these States—a comity which is never extended where the existence of the corporation, or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition" (8 Wall., 181).

In the case at bar the State court has construed the corporate powers of the plaintiff in error and has determined its liability by the same rules and principles which would be applied to a domestic corporation of like character. Should more than this be required?

"The equal protection of the law, which these bodies may claim, is only such as is accorded to similar associations within the jurisdiction of the State."
Mining Co. *vs.* Pa., 122 U. S., 188.

There would be great inequality if the contention of the plaintiff in error should prevail; for the association would then be exempt from liability under circumstances where a domestic corporation would be bound.

It is the settled doctrine of South Carolina that contracts free from fraud and not forbidden by law, which are in excess of corporate powers, will be enforced against a corporation that has received the benefits thereof. To permit a corporation to escape liability under such circumstances would (according to this doctrine) be to assist in a fraud, and be opposed to the public policy of the State.

No constitutional provision requires that the courts of that State should decide such a controversy in opposition to its own settled principles and in violation of its ideas of right and wrong and of public policy.

By coming into South Carolina and doing business there, this foreign corporation submitted itself to the jurisdiction of that State and consented to be bound (so far as the business done there is concerned) by the laws of that State, even though such laws impose upon the corporation liabilities not existing under the laws of New York. The charter and the laws of New York, by authorizing business to be done in other States, consented in advance to such result.

It follows, therefore, that if the association has been held, under the contract with Ebaugh, to a greater liability than that imposed by the laws of New York, the result is within the purview of such laws and of the charter.

The State court, however, did not undertake to decide this case without reference to the New York statute, but, on the contrary, considered fully its operation and effect. Even if its interpretation were radically wrong, this would be no denial of full faith and credit.

Banholzer *vs.* Matthews, 178 U. S., 402, and other cases cited in brief.

H. J. HAYNSWORTH,
Attorney for Defendant in Error.



Supreme Court of the United States.

No. 177.—October Term, 1901.

The Eastern Building and Loan Association of Syracuse, New York, Plaintiff in Error, *vs.* David W. Ebaugh. } In error to the Supreme Court of the State of South Carolina.

[April 7, 1902.]

The plaintiff in error is a building and loan association incorporated under the laws of the State of New York, and has its principal place of business in the city of Syracuse in that State. The defendant in error is a shareholder in said corporation, and brought this action in the Court of Common Pleas of the county of Greenville, State of South Carolina, for the par value of his stock, to wit, the sum of $1,000, or, failing in that, for the sum of $580, the money paid in by him.

By agreement of counsel all issues of law and fact were referred to a referee. The referee took testimony, and reported to the court "that the plaintiff is entitled to recover judgment against the defendant for the sum of one thousand dollars, with interest from October 15, 1898, at the rate of seven per cent per annum, and for the costs of this action."

The report of the referee was confirmed, and judgment was entered for the plaintiff (defendant in error) in accordance with the report. The judgment was affirmed by the Supreme Court of the State, and the case was then brought here.

The facts as recited in the opinion of the Court of Common Pleas are as follows:

"The defendant is a corporation organized under the laws of New York, with its principal place of business in the city of Syracuse. In the early part of the year 1892 it began business in the State of South Carolina, and organized in the city of Greenville a local branch of said association. The plaintiff is a resident of the city of Greenville, in said State. The defendant's agent approached the plaintiff for the purpose of inducing him to become a stockholder in the defendant company. The agent exhibited to the plaintiff a form of the certificate of stock, which contained, among other things, this promise:

'Eastern Building and Loan Association of Syracuse, New York, agree to pay said shareholder, or his heirs, executors, administrators or assigns, the sum of one hundred dollars for each of said shares, at the end of seventy-eight months.'

"At the same time the agent exhibited to him certain printed circulars, or literature, of the defendant company. One of these circulars was entitled 'The definite contract plan.' This circular stated:

'Q. What amount is deposited monthly? A. Seventy-five cents per share. . . .

'Q. When will the shares reach their par value? A. Shares mature in exactly six and one-half years.

'Q. How much will a member have to pay in altogether? A. On a basas of ten shares (one thousand dollars maturity value) he will have paid in five hundred and ninety-five dollars ($595) and receives one thousand dollars.' . . .

'All shares on which payments are made are regularly matured at the expiration of seventy-eight months (six and one-half years) from date of certificate. . . .

Illustration.

'Showing cost and profits to the investor of ten shares of $1,000 six and a half years, at time of maturity.

He pays a membership fee of $1.00 per share.....	$10 00
He pays monthly instalments of $7.50 per month for 78 months, $7.50 x 78.....	585 00
Total amount invested.....	$595 00
He receives in cash at maturity.....	1,000 00

. . . 'The only association making a contract definite in every particular. . . . Stock matures in seventy-eight months.'

"On reading the circulars and after listening to the persuasive talk of the agent, the plaintiff was induced to become a subscriber for ten shares of stock. Thereupon the certificate sued upon was issued to him. This certificate is dated on April 1, 1892. It certifies that 'D. W. Ebaugh, of Greenville, county of Greenville, and State of South Carolina, is hereby constituted a shareholder of the Eastern Building and Loan Association of Syracuse, New York, incorporated under the laws of New York, and holds ten shares therein of one hundred dollars each, and in consideration of the membership fee, together with agreements and statements contained in the application for membership in the association, and full compliance with the terms, conditions and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract; and the said Eastern Building and Loan Association of Syracuse, New York, agree to pay to said shareholder, or his heirs, executors, administrators or assigns, the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date hereof.

"Ebaugh paid the entrance fees, and continued to pay the monthly instalments until seventy-eight months had elapsed. The last payment was made on October 1, 1898. In subscribing to this stock and in making these payments, Ebaugh trusted to the statements contained in the circular and to the promise made in the certificate. About one month before the last payment was made, the association wrote to Ebaugh stating that they could not carry out the contract, and stating that they could not pay him one hundred dollars upon the end of seventy-eight months, but that he would have to continue making payments. In reply to this, Ebaugh wrote that he had made a definite contract with the association, and expected them to comply with its terms. A short time after making the last remittance he signed a blank receipt upon the back of the certificate, and sent the same to the association, with the request that they forward him a check for the money due him. The association refused to make payment, and on January 17, 1899, this action was commenced to recover from the associa-

tion the sum of one thousand dollars, with interest thereon from October 1, 1898. Certain property of the defendant company in this State was attached in said action.

"The defendant made answer, alleging that there was no contract to mature the stock at a definite period, but that it was only estimated that the stock would be matured in seventy-eight months. It also claims that any promise to mature the stock within a definite time would be contrary to their by-laws and charter, and contrary to the laws of New York.

"By agreement of counsel, all issues of law and fact were referred to Oscar Hodges, a member of the bar at Greenville, as special referee. Mr. Hodges took testimony, and heard argument, and filed his report, wherein he concludes 'that the plaintiff is entitled to recover judgment against the defendant for the sum of one thousand dollars, with interest from October 15, 1898, at the rate of seven per cent per annum, and for the costs of this action.'

"To this report the defendant filed certain exceptions. After hearing argument, I am satisfied that the report of the referee is correct in every particular, and the exceptions are hereby overruled. The defendant certainly made definite assurances in those circulars, and a definite promise as to the maturity of stock; that if the plaintiff would pay the entrance fees, and his monthly dues for seventy-eight months, that at the end of that time it would pay to him one hundred dollars for each share of stock taken by him. These assurances and this promise were made for the purpose of procuring the plaintiff as a stockholder. This promise was definite. The plaintiff relied upon it, and made the payment of his entrance fees, and his monthly dues. The association knew that the plaintiff was relying upon its promise, and allowed him to make all these payments and to incur the liability of a stockholder. It received the full benefit of this transaction, and it cannot now be heard to say that the contract was contrary to its by-laws, or its charter. Even if this contract were in excess of its charter powers, the association would, nevertheless, be bound by it, inasmuch as it received the full benefit thereof."

Mr. Justice McKenna delivered the opinion of the Court.

Plaintiff in error invokes against the judgment, to quote from the brief of counsel, "those provisions of the Constitution of the United States which declare that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State;' that no State shall 'pass . . . any law impairing the obligation of contracts,' and that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The protection of those constitutional provisions is claimed because it is asserted the courts of South Carolina disregarded the law of New York as expounded by the courts of that State.

Certain decisions of New York were introduced in evidence by plaintiff in error, and from them it is deduced that the law of the State was and is that

the contract between the association and its stockholders is constituted not only of the certificate of stock and its indorsement, but as well of the articles of association and the by-laws of the corporation, and therefore the period of maturity was an estimate, not an assurance. And further, that it was established as the law of New York, in *Malley* v. *People's Building Association*, (92 Hun, 572,) "that the authority to issue a certificate with a fixed period of maturity is not expressly given either by the statute or by articles of association, or by-laws of the association." And that the association "did not possess the power or authority to issue a certificate specifying a fixed maturity period, and that the clause in the certificate should be construed as an estimated period of maturity."

To the first proposition the courts of South Carolina answer with a finding of fact that the plaintiff in error had given the defendant in error a definite promise that his stock would mature in seventy-eight weeks—not a promise only by the certificate, but assurances in circulars and positive representations by an agent.

The Supreme Court of South Carolina did not find it necessary to concur with or dissent from the second proposition advanced by plaintiff in error. The court said:

"The appellant contends that the contract must be construed with reference to the laws of New York, and attempts to differentiate this case from those just mentioned (prior cases were cited) on the ground that the answer alleges, and the testimony establishes the fact, that under the laws of the State, the by-laws of the association and not its express agreement, must prevail in the interpretation of the contract between the parties.

"Both the master and Circuit Judge found as a matter of fact that the laws of New York did not forbid the defendant from entering into an agreement by which the shares of stock would mature in a definite time.

"In his report the master says:

'The question as to whether this promise was in excess of the charter powers, was not expressly decided by the Supreme Court, but that court did decide that even though it were in excess of its charter powers (in the language of *B. B. R. R. Co.* v. *McDonald*, 60 Am. St. Rep. 172): "The general rule is that where a private corporation has entered into a contract not immoral in itself, and not forbidden by any statute, and it has been in good faith performed by the other party, the corporation will not be heard on a plea of *ultra vires*."

'This proposition is fully sustained by the decisions of New York. The plaintiff introduced in evidence the following decisions of that court: *Whitney Arms Co.* v. *Barlow*, (63 N. Y. 62;) *De Grand* v. *American Linen Thread Co.*, (21 N. Y. 124;) *Diamond Match Co.* v. *Roeber*, (106 N. Y. 473.)

'This constituted the only evidence before me as to what was the law of New York touching this point. I find as a matter of fact that the law of New York is that where a corporation enters into a contract, that is in excess of its charter powers or is unauthorized by law, it will nevertheless be bound to perform its agreement as contained in the contract, if it suffers the other party to perform his agreement, and receives the benefits and retains them.

'This being the law of New York, it is conclusive of the case at issue.'

"The report of the master was confirmed in all respects by the Circuit Judge.

"As this is an action at law, the foregoing findings of fact are not subject to review, but are conclusive on this court.

"As the laws of New York are not in conflict with the construction which this court has placed upon contracts similar to that upon which the action herein is founded, we fail to discover any facts, causing us to differentiate this case from those hereinbefore mentioned."

It will be observed, therefore, that the case was presented to the Supreme Court of South Carolina with the facts found by the trial court as follows: (1) that the plaintiff in error had made a positive promise that the stock of defendant in error would mature in seventy-eight weeks; (2) under the assurance of that promise the defendant had subscribed for the stock and had performed in good faith all obligations on his part; (3) under such circumstances it was the law of New York that plaintiff in error could not be heard to say that its promise was *ultra vires.* And the court decided that such findings of fact were conclusive upon it.

The case is presented here under like conditions. This is a writ of error to the State court, and whatever was a question of fact there is a question of fact here. This court said, speaking by Chief Justice Waite, in *Chicago & Alton Railroad Co.* v. *Wiggins Ferry Co.*, (119 U. S. 615,) where, as in the case at bar, was invoked that provision of the Constitution of the United States which requires the courts of one State to give full faith and credit to the public acts of another:

"Whenever it becomes necessary under this requirement of the Constitution for a court of one State, in order to give faith and credit to a public act of another State, to ascertain what effect it has in that State, the law of that State must be proved as a fact. No court of a State is charged with knowledge of the laws of another State; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon. This court, and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several States of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review, is matter of fact here. This was expressly decided in *Hanley* v. *Donoghue*, (116 U. S. 1,) in respect to the faith and credit to be given by the courts of one State to the judgments of the courts of another State, and it is equally applicable to the faith and credit due in one State to the public acts of another."

We are not called upon, therefore, to review or reply to the very able argument of counsel for plaintiff in error, advanced to show that the situs of the contract between the parties was New York, and that the words "public acts," in article IV, sec. 1, of the Constitution of the United States, mean the public statutes of the State.

A necessary element in both propositions (if they may be regarded as independent) is the law of New York; and in the latter is involved not only what the statutory law is, but what its application is under the decisions of the courts of that State. Both, as we have seen, were facts to be proved, and the finding upon which is binding upon us.

Judgment affirmed.

Mr. Justice GRAY did not hear the argument and took no part in the decision.

True copy.

Test:

Clerk Supreme Court, U. S.